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Circuit Court of Appeals

For the Ninth Circuit.

JACKSON C. SAIN, HETTIE SAIN, ED. RAY,
JOSEPH H. McDONALD, MISSOULA
COUNTY, TENNIE E. GREENOUGH,
CLARA PIDGE, W. T. BURNETT, GEORGE
CROMWELL, GLENN STICHT, G. W.
LEAPHART, JOSEPHINE YOUNGQUIST,
HARRY E. STETSON, et al.,

Appellants,

vs.

THE MONTANA POWER COMPANY,
a Corporation,

Appellee.

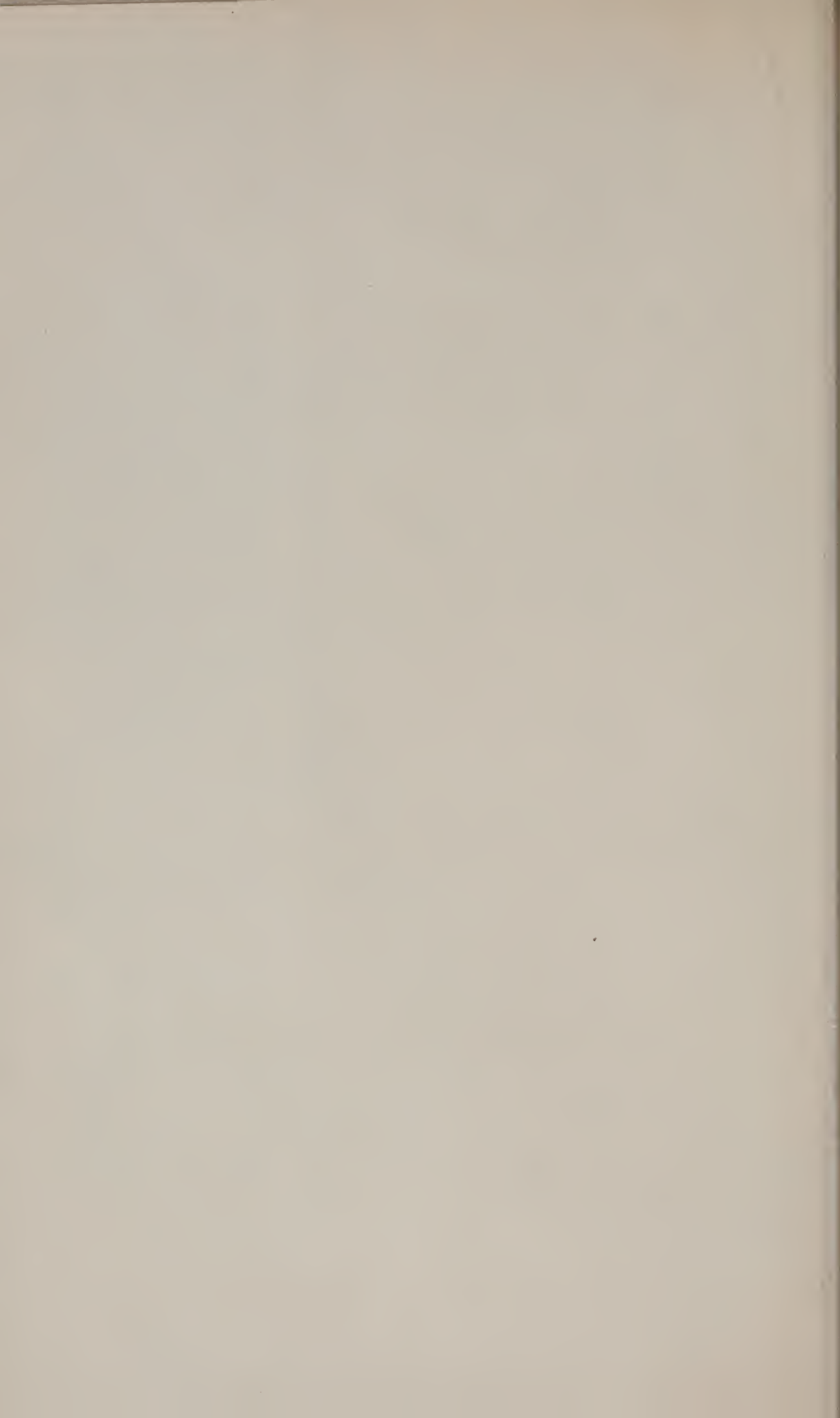
Transcript of Record

Upon Appeal from the District Court of the
United States for the District of Montana.

JUL 9 - 1934

PAUL P. O'BRIEN,

CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF SOLICITORS
OF RECORD.

Mr. S. P. WILSON,
of Deer Lodge, Montana, and
Mr. E. C. MULRONEY,
of Missoula, Montana,
Solicitors for Plaintiffs and Appellants.

Mr. W. L. MURPHY,
Mr. A. N. WHITLOCK,
Mr. WALTER L. POPE, and
Mr. JOHN E. CORETTE, Jr.,
All of Missoula Montana,
Solicitors for Defendant and Appellee. [1*]

In the District Court of the United States in and for
the District of Montana.

No. 1488.

JACKSON C. SAIN, et al.,
Plaintiffs,
vs.

THE MONTANA POWER COMPANY,
a corporation,
Defendant.

BE IT REMEMBERED, that on August 18th,
1933, Bill of Complaint was filed herein in the words
and figures following, to-wit: [2]

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

In the United States District Court for the District
of Montana, Missoula Division

JACKSON C. SAIN, HETTIE SAIN, ED RAY,
JOSEPH H. McDONALD, MISSOULA
COUNTY, TENNIE E. GREENOUGH,
CLARA PIDGE, W. T. BURNETT, GEORGE
CROMWELL, GLEN STICHT, C. W.
LEAPHART, JOSEPHINE YOUNGQUIST,
HARRY E. STETSON, A. M. ROGERS, I. E.
PETERSON, H. E. STURM, MINNIE L.
McCANN, A. L. KAGLE, ISRAEL Q. ROB-
ERTS, WILLIAM J. JOHNSON, HORACE
A. GREEN, PEARL GREEN, W. D. SAT-
TERFIELD, MARGARET A. SATTER-
FIELD, E. F. ROTH, ELLEN R. WHITING,
L. A. WAGONER, CHARLES E. LUCAS,
CHARLES A. MARTINSON and FREDA
MARTINSON, co-partners doing business un-
der the firm name of MISSOULA ICE COM-
PANY, ORPHA MILLER TALBOTT, and
RUSSELL H. MILLER,

Plaintiffs,

vs.

THE MONTANA POWER COMPANY,
a Corporation,

Defendant.

COMPLAINT IN EQUITY. [3]

Come now the plaintiffs and complain of the de-
fendant and allege:

I.

Jurisdiction of this case arises and is conferred upon this Honorable Court by reason of the diversity of the citizenship of the parties hereto. The plaintiffs are, and each of them is, a citizen of the State of Montana, and a resident of Missoula County, Montana; the defendant is a corporation organized and existing under the laws of the State of New Jersey and is a citizen of the State of New Jersey. The matter in controversy in this action exceeds, exclusive of interest and costs, the sum and value of \$3000.00.

II.

That Missoula County, one of the plaintiffs herein, is a body politic and corporate, organized and existing under the laws of the State of Montana; that Missoula Ice Company, one of the plaintiffs herein, is a corporation, organized and existing under the laws of the State of Montana; that Montana Power Company, the defendant herein, is a corporation organized and existing under the laws of the State of New Jersey. [4]

III.

That Rattlesnake Creek, described in this complaint, is a stream of fresh and flowing water arising in the mountains north of Missoula in Missoula County, Montana, and flowing southwardly into Missoula River and is a tributary of said Missoula River and is situated in Missoula County, Montana.

IV.

That upon the 9th day of July, 1903, in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, in a cause then pending in said Court, wherein the Missoula Water Company was plaintiff and Charles E. Williams and others were defendants, being Cause No. 1953 of said court, a decree was duly given, made, rendered and entered, adjudicating the waters of said Rattlesnake Creek between appropriators and claimants to the use of the waters of said creek and determining the respective rights, priorities and amounts to the use of such waters among the said appropriators and users thereof, a copy of said decree and judgment being hereto attached, marked Exhibit A and made a part of this complaint to the same extent as if here set forth in full. By the judgment and decree aforesaid the rights, priorities, amounts of water and dates of appropriations of the waters of Rattlesnake Creek were fully adjudicated and determined and said Rattlesnake Creek became, and thereafter was, an adjudicated stream, as defined by Section 7128, Revised Codes of Montana, 1921, and that said judgment has not been reversed nor in any way modified nor set aside.

V.

That in said Cause No. 1953 the Court did make findings of fact, Finding of Fact No. 1 being as follows: [5]

“1. That the plaintiff by its predecessors in interest made an appropriation of 946 inches of the waters of Rattlesnake Creek, mentioned and described in the complaint herein, about April 1, 1866, by what is called the Mill ditch, for mechanical, power and other beneficial purposes, and that the same has been used by plaintiff and its predecessors in interest ever since, and that no part thereof has ever been abandoned.”

Finding of Fact No. 2 being:

“2. That the plaintiff by its predecessors in interest made an appropriation of 160 inches of the waters of said Rattlesnake Creek, November 16, 1868, by what is called the original Higgins ditch, and that no part of said appropriation has ever been abandoned.”

Finding of Fact No. 9 being:

“9. That the plaintiff, by its predecessors in interest, about May 1, 1881, enlarged the original Higgins ditch and extended it to other lands, increasing its capacity and use from 160 inches to 508 inches, thereby making an additional appropriation of the waters of said Rattlesnake Creek of 348 inches, of date May 1, 1881, and that no part thereof has ever been abandoned.”

Defendant claims ownership of the water rights and appropriations of the waters of Rattlesnake

Creek found, decreed and described in said Findings of Fact 1, 2 and 9, foregoing described, and defendant at the times alleged in this complaint has assumed possession of said water rights and appropriations of water and has diverted said waters from said Rattlesnake Creek and has made use thereof and claims the same.

VI.

That the water right and appropriation of water described in Finding of Fact No. 1, foregoing, was appropriated through what is called the Mill ditch out of said Rattlesnake Creek and at all times from the time of the appropriation thereof down to and long subsequent to the date of the judgment in said Cause No. 1953 said water so appropriated and found and decreed in said Cause No. 1953, was diverted out of Rattlesnake [6] Creek through said Mill ditch and was used for mechanical and power purposes along said Mill ditch and was not diverted elsewhere nor used for other purposes.

That the water right and appropriation of water described in Finding of Fact No. 2, foregoing, was appropriated through what is called the original Higgins Ditch out of said Rattlesnake Creek and at all times from the time of the appropriation thereof down to and long subsequent to the date of the judgment in said Cause No. 1953, said water so appropriated and found and decreed in said Cause No. 1953, was diverted out of Rattlesnake Creek through said original Higgins ditch and was used for irrigation upon agricultural lands along said original Higgins ditch and was not diverted elsewhere nor used for other purposes.

That the water right and appropriation of water described in Finding of Fact No. 9, foregoing, was appropriated through what is called the original Higgins ditch enlarged out of said Rattlesnake Creek and at all times from the time of the appropriation thereof down to and long subsequent to the date of the judgment in said Cause No. 1953, said water so appropriated and found and decreed in said Cause No. 1953, was diverted out of Rattlesnake Creek through said original Higgins ditch enlarged and was used for irrigation upon agricultural lands along said original Higgins ditch enlarged and was not diverted elsewhere nor used for other purposes.

Said Mill ditch taps said Rattlesnake Creek upon its right bank about a quarter of a mile above the mouth of Rattlesnake Creek. Said original Higgins ditch and as enlarged taps said Rattlesnake Creek upon its right bank at a point about *two above* the mouth of Rattlesnake Creek. [7]

VII.

Defendant Montana Power Company claims to be the successor in interest of the Missoula Water Company, who was the plaintiff in said Cause No. 1953, in the ownership of all waters, water rights and appropriations of water decreed to said The Missoula Water Company in Cause No. 1953, and defendant has taken, and now takes, possession of the waters of Rattlesnake Creek as the successor in title and in interest of The Missoula Water Company to the extent of the appropriations found in

said Findings of Fact 1, 2 and 9, foregoing described.

That subsequent to the 9th day of July, 1903, and long prior to the commencement of this section the defendant and its predecessors in interest did abandon the water rights hereinbefore described—that is to say, the water rights and appropriations of water found and decreed in said Findings of Fact 1, 2 and 9, and each, both and all said water rights and appropriations of water—and defendant and its predecessors have abandoned the right to the use of said water and all thereof.

VIII.

That subsequent to the date of said decree and prior to the wrongful acts of the defendant herein alleged, defendant and its grantors and predecessors in interest abandoned said Mill ditch and the appropriation of water made through said Mill ditch. Plaintiffs are informed and believe and therefore allege, that when defendant and its predecessors in interest abandoned said appropriation of water through said Mill ditch, to-wit: The water right described in Finding of Fact No. 1, foregoing, defendant and its grantors and predecessors in interest went upon said Rattlesnake Creek to a point higher up on said creek than the head of said Mill ditch, that is to say, to a point near the North line [8] of Township 13 North, Range 19 West, and there pretended and attempted to divert from Rattlesnake Creek 946 inches of water, claiming the same as the water right described in said Finding of Fact No. 1.

The water right and appropriation of water described in said Finding of Fact No. 1 for 946 inches of water was appropriated and was decreed to be taken from the water flowing in said creek at the head of said Mill ditch and not elsewhere.

That subsequent to the date of said decree and prior to the wrongful acts of the defendant herein alleged, defendant and its grantors and predecessors in interest abandoned said original Higgins ditch and the appropriation of water made through said original Higgins ditch. Plaintiffs are informed and believe, and therefore allege, that when defendant and its predecessors in interest abandoned said appropriation of water through said original Higgins ditch, to wit: the water right described in Finding of Fact No. 2, foregoing, defendant and its grantors and predecessors in interest went upon said Rattlesnake Creek to a point higher up on said creek than the head of said original Higgins ditch, that is to say, to a point near the North line of Township 13 North, Range 19 West, and there pretended and attempted to divert from Rattlesnake Creek 160 inches of water, claiming the same as the water right described in said Finding of Fact No. 2. The water right and appropriation of water described in said Finding of Fact No. 2 for 160 inches of water was appropriated and was decreed to be taken from the water flowing in said creek at the head of said original Higgins ditch and not elsewhere.

That subsequent to the date of said decree and prior to the wrongful acts of the defendant herein alleged, defendant [9] and its grantors and predecessors in interest abandoned said original Higgins ditch enlarged and the appropriation of water made through said original Higgins ditch enlarged. Plaintiffs are informed and believe, and therefore allege, that when defendant and its predecessors in interest abandoned said appropriation of water through said original Higgins ditch enlarged, to-wit: the water right described in Finding of Fact No. 9, foregoing, defendant and its grantors and predecessors in interest went upon said Rattlesnake Creek to a point higher up on said creek than the head of said original Higgins ditch enlarged, that is to say, to a point near the North line of Township 13 North, Range 19 West, and there pretended and attempted to divert from Rattlesnake Creek 348 inches of water, claiming the same as the water right described in said Finding of Fact No. 9. The water right and appropriation of water described in said Finding of fact No. 9 for 348 inches of water was appropriated and was decreed to be taken from the water flowing in said creek at the head of said original Higgins ditch enlarged and not elsewhere.

IX.

Plaintiffs Jackson C. Sain and Hettie Sain are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Northwest Quarter of Southwest Quarter; East Half of East Half of Northwest Quarter of Southwest Quarter; six acres in the Northwest Quarter of the Southeast Quarter, all in Section Eleven, Township Thirteen North, Range Nineteen West.

The plaintiff Ed Ray is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit: [10]

Section Thirty-five (35) and the West Half of the West Half ($W\frac{1}{2}W\frac{1}{2}$) of Section Thirty-six (36), Township Fourteen (14) North, Range Nineteen (19) West.

The plaintiff Joseph H. McDonald is the owner of, in the possession of and entitled to the possession of the lands situated in Missoula County, Montana, and described in Exhibit "B" hereto attached and made a part of this complaint.

The plaintiff Missoula County is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

The Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4} NW\frac{1}{4}$) of Section Fourteen (14), Township Thirteen (13) North, Range Nineteen (19) West.

The plaintiff Tennie E. Greenough is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

sion of the following described lands situated in the City of Missoula, Missoula County, Montana, to-wit:

All of Block Twenty-three (23), Lots One (1) to Eight (8) inclusive; and Lot Ten (10) of Block Twelve (12); Lots One (1) to Six (6), inclusive; and Lots Eighteen (18) to Twenty-four (24), inclusive, together with the vacated alley in Block Twenty-five (25); all in Park Addition, according to the plat thereof on file in the office of the County Clerk and Recorder of Missoula County, Montana.

Also, the North Half ($N\frac{1}{2}$) of Lot Sixteen (16); all of Lots Seventeen (17), Eighteen (18), Nineteen (19), Twenty (20), Twenty-one (21), and Twenty-two (22); and the North Half ($N\frac{1}{2}$) of Lot Twenty-three (23); in Block Nine (9) of said Park Addition.

Together with eight (8) acres in the Southwest corner of the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$) of Section Fourteen (14), Township Thirteen (13), North of Range Nineteen (19) West. [11]

The plaintiffs, Clara Pidge and W. T. Burnett, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Beginning at the Northwest corner of the Northwest Quarter of the Northeast Quarter of Sec. 14, T. 13 N., R. 19 W., and running thence South 30 feet to the Northwest corner

of the tract to be described and running thence East on a line posted with the North side line of said Forty 80 rods, more or less, to the east side line of said Forty; thence South along said East line 99 feet; thence West on a line parallel with the said North side line 80 rods, more or less, to the West side line of said Forty; thence North along said West side line 99 feet to the place of beginning, containing 3 acres, more or less.

Beginning at the Northwest corner of the Northwest Quarter of the Northeast Quarter of Sec. 14, T. 13 N., R. 19 W., M. M., running thence South along the West line of said Forty 8 rods to a point which is the Northwest corner of the tract to be described; thence East 80 rods, more or less, to the East line of said Forty, thence South along the East line of said Forty 10 rods; thence West 8 rods, more or less, to the West line of said Forty; thence North 10 rods to the place of beginning, containing 5 acres, more or less.

The plaintiffs, George Cromwell and Glen Sticht, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

The Southeast Quarter of the Northeast Quarter and the South 526 feet of the Northeast Quarter of the Northeast Quarter of Sec. 14, T. 13 N., R. 19 W.

The plaintiff, C. W. Leaphart, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Beginning at the Southwest corner of the Southwest Quarter of the Northeast Quarter of Sec. 14, T. 13 N., R. 19 W., thence North 40 rods for a starting point; thence North 20 rods; thence East 80 rods, more or less; thence South 20 rods; thence West 80 rods, more or less, to the place of beginning, containing 10 acres, more or less.

The plaintiff, Josephine Youngquist, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit: [12]

Lot 13 of the Cobban Camp Sites, according to the plat thereof on file in the office of the County Clerk and Recorder of Missoula County, Montana, containing 4 acres, more or less.

The plaintiff, Harry E. Stetson, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Lots 6, 10 and 11 of Cobban Camp Sites, according to the plat thereof on file in the office of the County Clerk and Recorder of Missoula County, Montana, containing 9 acres, more or less.

The plaintiff, A. M. Rogers, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula, County, Montana, to-wit:

Beginning at the Southwest corner of the Northwest Quarter of the Northeast Quarter of Sec. 14, T. 13 N., R. 19 W. of Montana Meridian and running thence North along the West line of said quarter 33 feet to a point which is the Southwest corner of the land to be described and running thence North along said line 165 feet; thence East in line parallel with the South line of said quarter 80 rods, more or less, to the East line of said quarter; thence South along said East line 165 feet; thence West 80 rods, more or less, to the place of beginning, containing 5 acres, more or less.

The plaintiff, I. E. Peterson, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

The Northeast Quarter of Sec. 15, T. 13 N., R. 19 W., containing 157 acres, more or less.

The plaintiffs, H. E. Sturm and Minnie L. McCann, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Beginning at the Southwest corner of the Northwest Quarter of the Northeast Quarter

of Sec. 14, T. 13 N., R. 19 W., and running thence North 12 rods to a point which is the Southwest corner of the land to be described and running thence North 165 feet, thence East 80 rods, thence South 165 feet, thence West 80 rods, to place of beginning, containing 5 acres, more or less. [13]

The plaintiff, A. L. Kagle, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Commencing at the Southeast corner of the Northwest Quarter of the Northeast Quarter of Sec. 14, T. 13 N., R. 19 W., thence North along the East line of said quarter quarter section 363 feet to the Southeast corner of the tract to be described, thence West parallel with the South line of said quarter quarter section 80 rods, more or less, to the County Road, thence North 165 feet, thence East and parallel with the South line of said quarter quarter section 80 rods, more or less, to the East side line of said quarter quarter section, thence South 165 feet to the place of beginning, containing five acres, more or less.

The plaintiff, Israel Q. Roberts, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Beginning at the Southwest corner of the Northwest Quarter of the Southeast Quarter of Section 11, T. 13 N., R. 19 W., running thence North 2 rods to the Southwest corner of the tract to be described, thence East 40 rods, thence North 20 rods, thence West 40 rods, thence South 20 rods to the place of beginning, containing five acres, more or less.

The plaintiff, William J. Johnson, is the owner of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of Block 30 of Park Addition to the City of Missoula, Montana, according to the official plat thereof on file in the office of the County Clerk and Recorder of Missoula County, Montana.

The plaintiffs, Horace A. Green and Pearl Green, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Lots 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of Block 14 of Park Addition to the City of Missoula, Montana, according to the official plat thereof on file in the office of the County Clerk and Recorder of Missoula County, Montana.

[14]

The plaintiffs, W. D. Satterfield and Margaret A. Satterfield, are the owners of, in the possession of

and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Lots 10, 11, 12, 13, 14 and 15 of Block 30 of Park Addition to the City of Missoula, Montana, according to the plat thereof on file in the office of the County Clerk and Recorder of Missoula County, Montana.

The plaintiffs, E. F. Roth and Ellen R. Whiting, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

The Northwest Quarter of the Southeast Quarter of Section 14, T. 13 N., R. 19 W.

Also a tract, beginning at the Northwest corner of the Northwest Quarter of the Southeast Quarter of said Section 14, T. 13 N., R. 19 W., running thence North 330 feet, thence East 80 rods, thence South 330 feet, thence West 80 rods to the place of beginning, containing 50 acres, more or less.

The plaintiffs, L. A. Wagoner and Charles E. Lucas, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

Beginning at the Northwest corner of the Southeast Quarter of Sec. 11, T. 13 N., R. 19 W., and thence South 30 feet to a point which is the Northwest corner of the tract herein de-

scribed, thence East 40 rods, thence South 32 rods, thence West 40 rods, thence North 32 rods to the place of beginning, containing 8 acres.

The plaintiffs, Charles A. Martinson and Freda Martinson, co-partners doing business under the firm name of Missoula Ice Company, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

The East Half of the East Half of the Southwest Quarter of the Southwest Quarter and part of the West Half of the Southeast Quarter of the Southwest Quarter of Section 11, T. 13, N., R. 19 W., containing 26 acres [15] of land, together with an ice manufacturing plant for commercial purposes located thereon.

The plaintiffs, Orpha Miller Talbott and Russell W. Miller, are the owners of, in the possession of and entitled to the possession of the following described lands situated in Missoula County, Montana, to-wit:

A tract of land in the Northwest Quarter of the Northeast Quarter of Sec. 14, T. 13 N., R. 19 W., and particularly described as follows, to-wit: Beginning at the Southwest corner of the Northwest Quarter of the Northeast Quarter of said Section 14, and running thence North on the section line 528 feet to a point which is the Southwest corner of the tract to

be described, thence North along the section line 495 feet, thence on a line parallel with the south line of said quarter 80 rods, more or less, to the east side line of said quarter, thence south on said line 495 feet, thence west 80 rods, more or less, to the place of beginning, containing 15 acres.

Said lands of plaintiffs are all agricultural in character but dry and arid and incapable of producing crops without irrigation but will produce valuable crops when irrigated. [16]

X.

As an appurtenant to their land above described, plaintiffs J. C. Sain and Hattie Sain own and are entitled to the use and possession of the following described water rights out of Rattlesnake Creek, to-wit:

Right No. 18 in Cause No. 1953, decreed to William Neill, being 50 inches of the waters of said Rattlesnake Creek, as of August 29, 1890; that part of Right No. 21 in Cause No. 1953, decreed to William Neill, being 30 inches of the waters of Rattlesnake Creek, as of September 1, 1895; and that part of Right No. 21 in Cause No. 1953, decreed to E. J. Clements, being 6 inches of the waters of Rattlesnake Creek, as of September 1, 1895.

Said 50 inches of water of Rattlesnake Creek so decreed and established to William Neill by the decree in Cause No. 1953, were duly appropriated on August 29, 1890, by means of a dam constructed to

divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiffs and parts thereof for irrigation, domestic and other useful purposes and said waters and the whole thereof have been continuously used by said plaintiffs and their predecessors in interest upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

Said 30 inches of water of Rattlesnake Creek so decreed and established to William Neill by the decree in Cause No. 1953, were duly appropriated on September 1, 1895, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said [17] plaintiffs and parts thereof for irrigation, domestic and other useful purposes and said waters and the whole thereof have been continuously used by said plaintiffs and their predecessors in interest upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

Said 6 inches of water of Rattlesnake Creek so decreed and established to E. J. Clements by the decree in Cause No. 1953, were duly appropriated on September 1, 1895, by means of a dam constructed to divert said water from Rattlesnake Creek and

by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiffs and parts thereof for irrigation, domestic and other useful purposes and said waters and the whole thereof have been continuously used by said plaintiffs and their predecessors in interest upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to his land above described, Plaintiff Ed Ray owns and is entitled to the use and possession of the following described water rights out of Rattlesnake Creek, to-wit:

Right No. 17 in Cause No. 1953, decreed to Sebastian Effinger, being 100 inches of the waters of said Rattlesnake Creek, as of October 1, 1888.

Said 100 inches of water of Rattlesnake Creek so decreed and established to Sebastian Effinger by the decree in Cause No. 1953, were duly appropriated on October 1, 1888, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described [18] of said plaintiff and parts thereof for irrigation, domestic and other useful purposes and said waters and the whole thereof have been continuously used by said plaintiff and his predecessors in interest upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to his land, described in Exhibit "B" hereof, plaintiff J. H. McDonald owns and is entitled to the use and possession of the following described water rights out of Rattlesnake Creek, to-wit:

48 inches of right No. 5 of the waters of Rattlesnake Creek, decreed and established to Otto Quast, Jacob G. Ambrose and John A. Kapp, in Cause No. 1953, as of April 15, 1872; 40 inches of Right No. 10 of the waters of Rattlesnake Creek, in Cause No. 1953, decreed and established to H. C. Hollenbeck, as of August 28, 1882; 220.5 inches of Right No. 20 of the waters of Rattlesnake Creek, decreed and established to Otto Quast in Cause No. 1953, as of August 16, 1895; 56.8 inches of Right No. 21 of the waters of Rattlesnake Creek, decreed and established to H. C. Chattin, C. W. Chattin, B. F. Chattin and J. W. Chattin in Cause No. 1953, as of September 1, 1895.

Said 48 inches of water of Rattlesnake Creek so decreed and established to Otto Quast, Jacob G. Ambrose and John A. Kapp by the decree in Cause No. 1953, were duly appropriated on April 15, 1872, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands of said plaintiff described in Exhibit "B" hereof, and parts thereof for irrigation, domestic and other useful purposes and said waters and the whole thereof have been continuously used by said plaintiff and his predecessors in inter-

est upon said lands for such purposes since [19] the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

Said 40 inches of water of Rattlesnake Creek so decreed and established to H. C. Hollenbeck by the decree in Cause No. 1953, were duly appropriated on August 28, 1882, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands of the said plaintiff described in Exhibit "B" hereof, and parts thereof for irrigation, domestic and other useful purposes and said waters and the whole thereof have been continuously used by said plaintiff and his predecessors in interest upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

Said 220.5 inches of water of Rattlesnake Creek so decreed and established to H. C. Chattin, C. W. Chattin, B. F. Chattin and J. W. Chattin by the decree in Cause No. 1953, were duly appropriated on September 1, 1895, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands of said plaintiff described in Exhibit "B" hereof, and parts thereof for irrigation, domestic and other useful purposes and said waters and the whole

thereof have been continuously used by said plaintiff and his predecessors in interest upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to its land above described, plaintiff Missoula County owns and is entitled to the use and possession of the following described water rights out of Rattlesnake Creek, to-wit: [20]

That part of Rights No. 10 and 16 in Cause No. 1953, decreed and established to Missoula County, being for 36 inches of the waters of Rattlesnake Creek, as of August 28, 1882.

Said 36 inches of water of Rattlesnake Creek so decreed and established to Missoula County by the decree in Cause No. 1953, were duly appropriated on August 28, 1882, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiff and parts thereof for irrigation, domestic and other useful purposes and said waters, and the whole thereof, have been continuously used by said plaintiff upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to each of their several lands above described, plaintiffs Tennie L. Greenough, Clara Pidge, W. T. Burnett, C. W. Leaphart, A. M.

Rogers, H. E. Sturm, Minnie L. McCann, A. L. Kagle, William J. Johnson, Horace A. Green, Pearl Green, E. F. Roth, Ellen R. Whiting, Orpha Miller Talbott and Russell H. Miller own and are entitled to the use and possession of the parts and portions of Rights No. 10 and 16 in Cause No. 1953, as follows:

Tennie L. Greenough	15.85 inches thereof;
Clara Pidge and W. T. Burnett	3.136 inches thereof;
C. W. Leaphart	7.056 inches thereof;
A. M. Rogers	4.332 inches thereof;
H. E. Sturm and	
Minnie L. McCann	3.95 inches thereof;
A. L. Kagle	3.563 inches thereof;
William J. Johnson	2.959 inches thereof;
Horace A. Green and	
Pearl Green	1.568 inches thereof;
E. F. Roth and	
Ellen R. Whiting	15.68 inches thereof;
Orpha Miller Talbott and	
Russell H. Miller	11.76 inches thereof.

Each and all said amounts of water were duly appropriated through [21] the Hollenbeck Ditch and the extension thereof upon the 28th day of August, 1882, by means of a dam constructed to divert said water from Rattlesnake Creek, and by means of a ditch constructed to convey said water from said creek to and upon the several separate lands of said respective plaintiffs, above described, and parts of said land for irrigation, domestic and other

useful purposes and said waters, and the whole thereof, have been used continuously by said respective plaintiffs upon said lands for such purposes since the date of the appropriation thereof, and the whole of said waters is necessary for the irrigation of said several tracts of land.

As an appurtenant to its land above described, plaintiffs George Cromwell and Glen Sticht own and are entitled to the use and possession of the following described water rights out of Rattlesnake Creek, to-wit:

That part of Right No. 20 in Cause No. 1953, decreed and established to Jeanette Francis Sticht, being for 5 inches of the waters of Rattlesnake Creek, as of August 16th, 1895.

Said 5 inches of water of Rattlesnake Creek so decreed and established to Jeanette Francis Sticht by the decree in Cause No. 1953 were duly appropriated on August 28th, 1882, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch to convey said water from said creek to and upon the lands above described of said plaintiff, and parts thereof, for irrigation and other useful purposes and said water, and the whole thereof, have been continuously used by said plaintiffs upon said lands for such purposes since the date of the appropriation thereof and the whole of said water is necessary for the proper irrigation of said lands.

As an appurtenant to his land above described,

plain- [22] tiff owns and is entitled to the use and possession of the following described water right out of Rattlesnake Creek, to-wit:

5 inches of Right No. 20 in Cause No. 1953, decreed and established to Elmer Hughes as of August 16th, 1895, said 5 inches of water of Rattlesnake Creek so decreed and established to Elmer Hughes by the decree in Cause No. 1953 were duly appropriated on August 16th, 1895, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said water from said creek to and upon the lands above described of said plaintiff, and parts thereof, for irrigation, domestic and other useful purposes, and said waters, and the whole thereof, have been continuously used by said plaintiff upon said land for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to their land plaintiffs H. E. Sturm and Minnie L. McCann own and are entitled to the use and possession of 2½ inches out of right No. 20 in Cause No. 1953 decreed and established to Elmer Hughes as of date August 16th, 1895.

Said 2½ inches of the waters of Rattlesnake Creek so decreed and established to Elmer Hughes by the decree in Cause No. 1953 were duly appropriated on August 16th, 1895, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to con-

vey said waters from said creek to and upon the lands above described of said plaintiffs, and parts thereof, for irrigation, domestic and other useful purposes and said waters, and the whole thereof, have been continuously used by said plaintiffs upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

[23]

As an appurtenant to his land plaintiff A. L. Kagle owns and is entitled to the use and possession of 5 inches out of Right No. 20 in Cause No. 1953 decreed and established to Elmer Hughes as of date August 16th, 1895.

Said 5 inches of the waters of Rattlesnake Creek so decreed and established to Elmer Hughes by the decree in Cause No. 1953 were duly appropriated on August 16th, 1895, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiff, and parts thereof, for irrigation, domestic and other useful purposes and said waters, and the whole thereof, have been continuously used by said plaintiff upon his lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to their land plaintiffs Orpha Miller Talbott and Russell H. Miller own and are

entitled to the use and possession of 15 inches out of right No. 20 in Cause No. 1953 decreed and established to Elmer Hughes as of date August 16th, 1895.

Said 15 inches of the waters of Rattlesnake Creek so decreed and established to Elmer Hughes by the decree in Cause No. 1953 were duly appropriated on August 16th, 1895, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiffs, and parts thereof, for irrigation, domestic and other useful purposes, and said waters, and the whole thereof, have been continuously used by said plaintiffs upon said lands for such purposes since [24] the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to her land above described plaintiff Josephine Youngquist owns and is entitled to the use and possession of 5 inches of Right No. 22 in Cause No. 1953 decreed and established to W. R. Hamilton, H. E. Day and R. E. Brandt as of August 29th, 1898.

Said 5 inches of the waters of Rattlesnake Creek so decreed and established to Elmer Hughes by the decree in Cause No. 1953 were duly appropriated August 29th, 1898, by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to

convey said waters from said creek to and upon the lands above described of said plaintiff, and parts thereof, for irrigation, domestic and other useful purposes, and said waters, and the whole thereof, have been continuously used by said plaintiff upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to his lands above described plaintiff I. E. Peterson owns and is entitled to the use and possession of 50 inches of right No. 22 in Cause No. 1953 decreed and established to W. R. Hamilton, as of August 29th, 1898.

Said 50 inches of the waters of Rattlesnake Creek so decreed and established to W. R. Hamilton by the decree in Cause No. 1953 were duly appropriated on August 29th, 1898 by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiff, and parts thereof, for irrigation, domestic and other useful purposes, and said waters, and the whole thereof, have been continuously [25] used by said plaintiff upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to his land above described plaintiff Israel Q. Roberts owns and is entitled to the use and possession of 3 inches of Right No. 5 in

Cause No. 1953 decreed and established to Jacob G. Ambrose as of April 15th, 1872, and 14 inches of Right No. 21 decreed and established to Jacob G. Ambrose as of September 1st, 1895.

Said 17 inches of water of Rattlesnake Creek so decreed and established to Jacob G. Ambrose by the decree in Cause No. 1953 were duly appropriated, 3 inches thereof on April 15th, 1872, and 14 inches thereof on September 1st, 1895 by means of a dam constructed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiff, and parts thereof, for irrigation, domestic and other useful purposes, and said waters, and the whole thereof, have been continuously used by said plaintiff upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to their lands above described plaintiffs L. A. Wagoner and Charles E. Lucas own and are entitled to the use and possession of 20½ inches of Right No. 21 in Cause No. 1953 decreed and established to R. M. Cobban, W. H. Raymond, C. E. Williams and William Neil as of date September 1st, 1895.

Said 20½ inches of the waters of Rattlesnake Creek so decreed and established to R. M. Cobban, W. H. Raymond, C. E. Williams and William Neil by the decree in Cause No. 1953 were duly appro-

priated on September 1st, 1895, by means of a dam construct- [26] ed to divert said water from Rattlesnake Creek and by means of a ditch constructed to convey said waters from said creek to and upon the lands above described of said plaintiffs, and parts thereof, for irrigation, domestic and other useful purposes, and said waters, and the whole thereof, have been continuously used by said plaintiffs upon said lands for such purposes since the date of the appropriation thereof and the whole of said waters is necessary for the proper irrigation of said lands.

As an appurtenant to its lands above described plaintiffs Charles A. Martinson and Freda Martinson, doing business under the firm name of Missoula Ice Company, own and are entitled to the use and possession of 150 inches of the waters of Rattlesnake Creek through the Hollenbeck Ditch as of August 1st, 1901; said 150 inches of water having been duly appropriated on August 1st, 1901, by means of a dam constructed to divert said water from said Rattlesnake Creek and by means of a ditch constructed to convey the same from said creek to and upon the lands above described for the purpose of ice manufacture and said water, and the whole thereof, have been continuously used by said plaintiffs for such purposes since the date of the appropriation thereof and the whole of said water is necessary for such uses. Said water is used only at a time after the expiration of the irrigation sea-

son in each year when the water is not required by any agricultural users of water from said Hollenbeck Ditch who are entitled to the use of the same and the right of the plaintiffs to such use of the water is to be limited to the purpose of ice manufacture and at a time of the year when the water is not required for irrigation by other users of water for irrigation through the Hollenbeck Ditch. [27]

XI.

The place of diversion of the water which each plaintiff is entitled to use is near the north line of Township 13, North Range 19 West.

XII.

Water more than sufficient to supply the 946 inches claimed by defendant and decreed to The Missoula Water Company from the water flowing in said stream at the head of said Mill ditch at all times herein mentioned did rise and has always risen in Rattlesnake Creek in the bed of said creek and in said Rattlesnake Creek basin below the points of diversion of plaintiffs and each and all of plaintiffs and above the head of said Mill ditch; notwithstanding the use by plaintiffs and each and all of plaintiffs of the water owned by them, and each of them, and which they, and each of them are entitled to use at all times herein mentioned, there always was and is sufficient water flowing in said creek at the head of said Mill ditch to supply

the water described in said Finding of Fact No. 1, and during all of the times mentioned in this complaint said 946 inches of water so appropriated and decreed for said Mill ditch flowed down said creek past the head of said Mill ditch and flowed to waste out of the mouth of said creek. During the seasons of 1931, 1932, and 1933, defendant and its predecessors in interest attempted to take 946 inches of water out of said creek near the north line of Township 13 North, Range 19 West, claiming the same to be the water right described in said Finding of Fact No. 1 and in so doing defendant did deprive plaintiffs and each of plaintiffs of water which plaintiffs and each of plaintiffs were entitled to use. That the pretended and attempted change in the point of diversion of the water described in said Finding of Fact No. 1 has resulted in injury to plaintiffs and each of [28] plaintiffs.

XIII.

Water more than sufficient to supply the 160 inches claimed by defendant and decreed to the Missoula Water Company from the water flowing in said stream at the head of said original Higgins ditch at all times herein mentioned did rise and has always risen in Rattlesnake Creek in the bed of said creek and in said Rattlesnake Creek basin below the points of diversion of plaintiffs and each and all of plaintiffs and above the head of said original Higgins ditch; notwithstanding the use by plaintiffs

and each and all of plaintiffs of the water owned by them, and each of them, and which they, and each of them, are entitled to use at all times herein mentioned, there always was and is sufficient water flowing in said creek at the head of said original Higgins ditch to supply the water described in said Finding of Fact No. 2, and during all of the times mentioned in this complaint said 160 inches of water so appropriated and decreed for said original Higgins ditch flowed down said creek past the head of said original Higgins ditch and flowed to waste out of the mouth of said creek. During the seasons of 1931, 1932 and 1933, defendant and its predecessors in interest attempted to take 160 inches of water out of said creek near the north line of Township 13 North, Range 19 West, claiming the same to be the water right described in said Finding of Fact No. 2 and in so doing defendant did deprive plaintiffs and each of plaintiffs of water which plaintiffs and each of plaintiffs were entitled to use. That the pretended and attempted change in the point of diversion of the water described in said Finding of Fact No. 2 has resulted in injury to plaintiffs and each of plaintiffs. [29]

XIV.

Water more than sufficient to supply the 348 inches claimed by defendant and decreed to The Missoula Water Company from the water flowing in said stream at the head of said original Hig-

gins ditch enlarged at all times herein mentioned did rise and has always risen in Rattlesnake Creek in the bed of said creek and in said Rattlesnake Creek basin below the points of diversion of plaintiffs and each and all of plaintiffs and above the head of said original Higgins ditch enlarged; notwithstanding the use by plaintiffs and each and all of plaintiffs of the water owned by them, and each of them, and which they, and each of them, are entitled to use at all times herein mentioned, there always was and is sufficient water flowing in said creek at the head of said original Higgins ditch enlarged to supply the water described in said Finding of Fact No. 9, and during all of the times mentioned in this complaint said 348 inches of water so appropriated and decreed for said original Higgins ditch enlarged flowed down said creek past the head of said original Higgins ditch enlarged and flowed to waste out of the mouth of said creek. During the seasons of 1931, 1932, and 1933, defendant and its predecessors in interest attempted to take 348 inches of water out of said creek near the north line of Township 13 North, Range 19 West, claiming the same to be the water right described in said Finding of Fact No. 9 and in so doing defendant did deprive plaintiffs and each of plaintiffs of water which plaintiffs and each of plaintiffs were entitled to use. That the pretended and attempted change in the point of diversion of the water described in said Finding of Fact No. 9 has resulted in injury to plaintiffs and each of plaintiffs.

XV.

That if defendant would divert the water decreed to The [30] Missoula Water Company and which defendant claims to have the right to use, at the head of the Mill ditch, original Higgins ditch, and original Higgins ditch enlarged, as hereinbefore described, then the water flowing in said creek near the north line of Township 13 North, Range 19 West, would all be available to supply the appropriations and rights of the plaintiffs, herein alleged, and defendant ought to supply its water right, if it has any such, at the heads of said Mill ditch, original Higgins ditch and original Higgins ditch enlarged; that by attempting to supply the rights decreed to The Missoula Water Company and which the defendant now claims the right to use at a point near the North line of Township 13 North, Range 19 West, defendant takes water from Rattlesnake Creek necessary to supply the rights of the plaintiffs, and all the plaintiffs, and deprives plaintiffs of water which they need and which they are entitled to use; at the same time defendant permits water flowing in said Rattlesnake Creek at the heads, respectively, of said Mill ditch, original Higgins ditch and original Higgins ditch enlarged, sufficient in quantity to supply its said rights, to flow to waste out of the mouth of said creek. During each of the irrigation seasons of 1931, 1932, and 1933, defendant diverted the water decreed to The Missoula Water Company and described in Findings of Fact numbered 1, 2 and 9, near the North Line of Township

13 North, Range 19 West, and did thereby exhaust the flow of Rattlesnake Creek and did prevent plaintiffs, and all of them, from using the water of said creek which they were entitled to use, to their irreparable damage and injury.

XVI.

Defendant, claiming to be the owner, claims the perpetual right to change the point of diversion of said waters so [31] described in Findings of Fact numbered 1, 2 and 9 of Cause No. 1953, and so decreed to The Missoula Water Company, to a point near the North line of Township 13 North, Range 19 West, and thereby intends to, and unless enjoined by this Court will, perpetually so divert the entire flow of Rattlesnake Creek to the irreparable damage and injury of plaintiffs, and each and all of the plaintiffs.

XVII.

By the attempted change of point of diversion aforesaid, defendant is depriving plaintiffs, and all of plaintiffs, of the waters which they own and which they, and each of them, need for the irrigation of their own agricultural crops, by reason whereof plaintiffs' agricultural crops are being injured and destroyed and defendant intends and threatens to continue said attempted change of point of diversion of said water perpetually and will so continue to divert said waters to the irreparable loss of all of the plaintiffs unless enjoined by this Court. The claim of defendant to the right to change said point

of diversion of water rights, which it claims, is without authority of law and is invalid.

XVIII.

The value of the use of the waters of Rattlesnake Creek to the plaintiffs of their water rights herein described exceeds \$25,000.00 and if defendant continues to make the change in the point of diversion of the waters, which defendant claims and as herein described, such acts of defendant will and do destroy the water rights of plaintiffs to their damage and injury in excess of \$25,000.00.

XIX.

The appropriations of the waters of Rattlesnake Creek of the plaintiffs and of each of the plaintiffs, herein described, [32] were accomplished and completed and many years prior in date to the pretended and attempted change of point of diversion of defendant and its predecessors in interest, from respectively the heads of the Mill ditch, original Higgins ditch and original Higgins ditch enlarged to a point near the North line of Township Thirteen North, Range 19 West; if defendant or its predecessors in interest ever acquired any right to divert any of the waters of Rattlesnake Creek at or near the last named point, such right of defendant is subsequent and junior to the rights of the plaintiffs, and each and all such rights, and is subject thereto, and defendant does not have the right to divert the waters of Rattlesnake Creek at or near the last named point at any time when the plaintiffs or any

of the plaintiffs have need for the waters of said creek.

XX.

That the acts and conduct of defendant herein alleged and claim of defendant herein alleged constitute and are a cloud upon plaintiffs' right and title to their several properties; and notwithstanding that defendant's said claims and acts are without authority of law, the same interfere with the right to his property of each plaintiff and with his enjoyment thereof and plaintiffs do not have, nor has any of the plaintiffs, any plain, speedy or adequate remedy at law.

WHEREFORE, plaintiffs demand judgment herein as follows:

1. That defendant be required to set forth its claims to the water rights and property herein described and that the same be decreed and adjudged to be junior and inferior to the rights of the plaintiffs and all of them and subject thereto.

2. That it be decreed by the Court that the attempted change of point of diversion of the water rights decreed to The Missoula [33] Water Company and described in Findings of Fact No. 1, 2 and 9, respectively, of the Decree in Cause No. 1953, has resulted in injury to the plaintiffs, and each of the plaintiffs, and that defendant be enjoined from continuing to make such change in point of diversion and be enjoined from claiming the right to change said point of diversion; that if defendant shall have any right to change the point of diver-

sion of said water rights or any thereof to a point near the North line of Township 13 North, Range 19 West, its right be decreed to be junior and inferior to the rights of plaintiffs and subject thereto.

3. That defendant be enjoined and restrained from interfering with plaintiffs' water rights herein described or the use by them or any of them of the waters of Rattlesnake Creek to which they or he may be entitled.

4. That plaintiffs have their costs herein incurred and such other and further relief as to the Court may seem equitable.

5. That a Writ of Subpoena issue herein, directed to the above named defendant, commanding it on a day certain to appear and answer this Bill of Complaint, but not under oath, answer under oath being hereby expressly waived.

S. P. WILSON,

Deer Lodge, Montana.

E. C. MULRONEY,

Missoula, Montana.

Attorneys for Plaintiffs.

United States of America,

State of Montana,

District of Montana.—ss.

Jackson C. Sain, being duly sworn, deposes and says: That he is one of the plaintiffs in the above entitled action and makes this verification for and on behalf of all the plaintiffs. Deponent has heard read the foregoing Bill of Complaint and knows the

contents thereof and deponent says that the same is true and correct of his own knowledge, except those allegations therein made upon information and belief and as to those, he believes the same to be true.

JACKSON C. SAIN.

Subscribed and sworn to before me this 16th day of August, 1933.

[Seal]

LILIAN C. WENZEL,

Notary Public for the State of Montana,
residing at Missoula, Montana.

My Commission expires Feb. 10, 1936. [34]

EXHIBIT "A"

In the District Court of the Fourth Judicial District
of the State of Montana, in and for
the County of Missoula

Cause No. 1933.

THE MISSOULA WATER COMPANY, .
a Corporation,

Plaintiff,

vs.

CHARLES E. WILLIAMS, ET AL.,

Defendants.

Be it remembered that the above entitled cause came on regularly for trial on the 31st day of

March, 1902, and divers days thereafter, before the court, a trial by jury having been expressly waived by all the parties to the action appearing by their respective attorneys.

Evidence was introduced on the part of the plaintiff and on the part of the several defendants appearing herein, and also on the part of certain intervenors, and after the conclusion of the testimony the case was subsequently argued orally by counsel for the respective parties and briefs and written arguments were also submitted, and thereafter the cause was submitted to the court for decision; and the court having considered the pleadings of the several parties, the evidence and the arguments and briefs of counsel, and being advised in the premises, now makes the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

1. That the plaintiff by its predecessors in interest made an appropriation of 946 inches of the waters of Rattlesnake Creek, mentioned and described in the complaint herein, about April 1, 1866, by what is called the Mill Ditch, for mechanical, power and other beneficial purposes, and that the same has been used by plaintiff and its predecessors in interest ever since, [35] and that no part thereof has ever been abandoned.

2. That the plaintiff by its predecessors in interest made an appropriation of 160 inches of the waters of said Rattlesnake Creek November 16,

1868, by what is called the original Higgins ditch, and that no part of said appropriation has ever been abandoned.

3. That the plaintiff by its predecessors in interest made an appropriation of 13 and $\frac{1}{2}$ inches of the waters of said Rattlesnake Creek about April 1, 1871, by what is called the first water works or city flume or pipe, for the purpose of supplying the citizens of Missoula and vicinity with water for domestic, irrigation and other beneficial purposes, and that the same has been used continuously ever since, and that no part thereof has ever been abandoned.

4. That the plaintiff and the intervenor Philomene Fredline, as administratrix, of the estate of John A. Fredline, deceased, by their predecessors in interest, made an appropriation of 75 inches of the waters of Rattlesnake Creek about May 1, 1871, by what is called the Fredline ditch, and that the plaintiff is the owner of 65 inches thereof, and the said Philomene Fredline as such administratrix is the owner of 10 inches thereof.

6. That the intervenors Alvina Pelkey, Lovina Flagler and Gus Marotz by their predecessors in interest made an appropriation of 20 inches of the waters of said Rattlesnake Creek about May 1, 1875, by an enlargement of said Fredline ditch.

5. That the defendants Charles E. Williams, Jennie Williams, Otto Quast and Jacob G. Ambrose, and H. C. Chattin, John W. Chattin, Charles W. Chattin, Benjamin F. Chattin and John A.

Kapp, by their predecessors in interest, made an appropriation of 160 inches of the waters of the said Rattlesnake Creek about April 15th, 1872.

7. That the defendant Peter Federsohn, by his predecessors in interest, made an appropriation of 50 inches of the waters of the said Rattlesnake Creek about May 1, 1879, for power, [36] dairy and milk cooling purposes, by diverting the same from said creek and returning the same amount to the creek a short distance below the point of diversion, without using up or consuming any substantial part thereof.

8. That the plaintiff by its predecessors in interest about April 1, 1881, constructed a new flume or pipe for the water works or city flume, thereby increasing the capacity of said water works from 13 and $\frac{1}{2}$ inches to 60 inches, and thus made an additional appropriation of the waters of said Rattlesnake Creek, of said date, of $46\frac{1}{2}$ inches, for the same purpose as the original water works appropriation, and that no part thereof has ever been abandoned.

9. That the plaintiff, by its predecessors in interest, about May 1, 1881, enlarged the original Higgins ditch and extended it to other lands, increasing its capacity and use from 160 inches to 508 inches, thereby making an additional appropriation of the waters of said Rattlesnake Creek of 348 inches, of date May 1, 1881, and that no part thereof has ever been abandoned.

10. That the defendants H. C. Hollenbeck, Wallace P. Smith, Elmer Hughes, C. M. Owen, Emma

Schilling, Mary E. Nesmith, Mamie E. Murray, Ollie D. Mattison, Amanda Mattison, Refus Stryker, Alice M. Cobban, Lena Smith, A. E. Pound, H. C. Chattin, H. Hazleton, Adeline C. Biggs, Della T. Wright, Carrie B. Raymond, Beadie Moss, C. H. Moss, Effie M. Kilbourne, Thomas P. Street, A. B. Libby, W. A. Buswell, Mrs. E. H. Sherman, J. B. Frazier, J. E. Johnson, John White and Missoula County, by their predecessors in interest, August 28, 1882, made an appropriation of 145 inches of the waters of said Rattlesnake Creek, by what is called the Hollenbeck ditch conducting water to the Hollenbeck homestead.

11. That the defendant Peter Federsohn, by his predecessors in interest, made an appropriation of 130 inches of the waters of said Rattlesnake Creek on October 8, 1882.

12. That the defendant Missoula Lodge No. 13, Ancient Free and Accepted Masons, by its predecessors in interest made an appropriation of 30 inches of the waters of said Rattlesnake Creek [37] about June 1, 1884.

13. That the defendant Theodore Lachambre, by his predecessors in interest, made an appropriation of 20 inches of the waters of said Rattlesnake Creek, July 1, 1886.

14. That the plaintiff by its predecessors in interest about June 1, 1887, constructed a new flume and ditch for said water works, thereby increasing the capacity of said water works and the amount of water diverted and conducted thereby from 60 inches to 705 and $\frac{1}{2}$ inches, thereby making an

additional appropriation of the waters of said Rattlesnake Creek of 645 inches, of date June 1, 1887, for the same purposes as the two prior water works appropriations, and that no part thereof has even been abandoned.

15. That the defendant James S. Kemp made an appropriation of 100 inches of the waters of said Rattlesnake Creek June 1, 1888.

16. That the defendants H. C. Hollenbeck, Wallace P. Smith, Elmer Hughes, C. M. Owen, Emma Schilling, Mary F. Nesmith, Mamie E. Murray, Ollie D. Mattison, Amanda Mattison, Rufus Stryker, Alice M. Cobban, Lena Smith, A. E. Pount, H. C. Chattin, H. Hazleton, Adeline C. Biggs, Della T. Wright, Carrie B. Raymond, Beadie Moss, C. H. Moss, Effie M. Kilbourne, Thomas P. Street, A. B. Libby, W. A. Buswell, Mrs. E. H. Sherman, J. B. Frazier, J. E. Johnson, John White and Missoula County, by their predecessors in interest, made an additional appropriation of the waters of said Rattlesnake Creek to the appropriation mentioned in No. 10 of these Findings, to the extent of 50 inches, by an extension of the above mentioned Hollenbeck ditch to what is called the Daly pre-emption claim, on July 1, 1888.

17. That the defendant Sebastian Effinger made an appropriation of 100 inches of the waters of said Rattlesnake Creek about October 1, 1888.

18. That the defendant William Neill made an appropriation of 50 inches of the waters of said Rattlesnake Creek on August 29, 1890. [38]

19. That the defendant George Duncan made an appropriation of 50 inches of the waters of said Rattlesnake Creek, May 15, 1892.

20. That the defendants Charles E. Williams, Otto Quast, Elmer Hughes, Ollie D. Mattison, Mary F. Nesmith, Jeanette Stitch, John White and John G. Johnson, by their predecessors in interest, made an appropriation of 393 inches of the waters of said Rattlesnake Creek August 16, 1895.

21. That the defendants R. M. Cobban, W. H. Raymond, Charles E. Williams, William Neill, Jacob G. Ambrose, H. C. Chattin, C. W. Chattin, B. F. Chattin, J. W. Chattin, L. W. Barrett, E. J. Clements and John Capp, by their predecessors in interest made an appropriation of 341 inches of the waters of said Rattlesnake Creek on September 1, 1895.

22. That the defendants W. R. Hamilton, H. E. Day and R. E. Brandt made an appropriation of 75 inches of the waters of said Rattlesnake Creek August 29, 1898, and that the defendants Lucretia Worden, Lucina Worden Sterling, Henry O. Worden, Caroline Worden Dixon, Louise Worden Bradley, Frank L. Worden, Horace B. Worden and Ruth M. Worden also made an appropriation of 40 inches of the waters of said Rattlesnake Creek on said 29th day of August, 1898.

23. That the defendant A. E. Franklin made an appropriation of 100 inches of the waters of said Rattlesnake Creek on July 25, 1901.

CONCLUSIONS OF LAW

1. That the plaintiff is entitled to the use and enjoyment of 946 inches of the waters of Rattlesnake Creek, statutory measure, of date April 1, 1866.

2. That the plaintiff is entitled to the use and enjoyment of 160 inches of the waters of Rattlesnake Creek, statutory measure, of date November 16, 1868. [39]

3. That the plaintiff is entitled to the use and enjoyment of 13 and $\frac{1}{2}$ inches of the waters of Rattlesnake Creek, statutory measure, of date April 1, 1871.

4. That the plaintiff is entitled to the use and enjoyment of 65 inches, and that the intervenor Philomene Fredline, as administratrix of the estate of John A. Fredline, deceased, is entitled to the use and enjoyment of 10 inches, of the waters of Rattlesnake Creek, statutory measure, both of date May 1, 1871.

6. That the intervenors Alvina Pelkey, Lovina Flagler and Gus Marotz are entitled to the use and enjoyment of 20 inches of the waters of Rattlesnake Creek, statutory measure, of date May 1, 1875.

5. That the defendants Charles E. Williams, Jennie Williams, Otto Quast, Jacob G. Ambrose, H. C. Chattin, John W. Chattin, Charles W. Chattin, Benjamin F. Chattin and John A. Kapp are entitled to the use and enjoyment of 160 inches of

the waters of Rattlesnake Creek, statutory measure, of date April 15, 1872.

7. That the defendant Peter Federsohn is entitled to the use and enjoyment of 50 inches of the waters of Rattlesnake Creek, of date May 1, 1879, for power, dairy and milk cooling purposes to be diverted and substantially the same amount to be returned to said creek a short distance below the point of diversion without substantial diminution or consumption.

8. That the plaintiff is entitled to the use and enjoyment of 46 and $\frac{1}{2}$ additional inches of the waters of said Rattlesnake Creek, statutory measure, of date April 1, 1881.

9. That the plaintiff is entitled to the use and enjoyment of 348 inches of the waters of Rattlesnake Creek, statutory measure, of date May 1, 1881. [40]

10. That the defendants H. C. Hollenbeck, Wallace P. Smith, Elmer Hughes, C. M. Owen, Emma Schilling, Mary F. Nesmith, Mamie E. Murray, Ollie D. Mattison, Amanda Mattison, Rufus Stryker, Alice M. Cobban, Lena Smith, A. E. Pound, H. C. Chattin, H. Hazelton, Adeline C. Biggs, Della T. Wright, Carrie B. Raymond, Beadle Moss, C. H. Moss, Effie M. Kilbourne, Thomas P. Street, A. B. Libby, W. A. Buswell, Mrs. E. H. Sherman, J. B. Frazier, J. E. Johnson, John White and Missoula County, are entitled to the use and enjoyment of 145 inches of the waters of Rattlesnake Creek, statutory measure, of date August 28, 1882.

11. That the defendant Peter Federsohn is entitled to the use and enjoyment of 130 inches of the waters of Rattlesnake Creek, statutory measure, of date October 8, 1882.

12. That the defendant Missoula Lodge No. 13, Ancient Free and Accepted Masons, is entitled to the use and enjoyment of 30 inches of the waters of Rattlesnake Creek, statutory measure, of date June 1, 1884.

13. That the defendant Theodore Lachambre is entitled to the use and enjoyment of 20 inches of the waters of Rattlesnake Creek, statutory measure, of date July 1, 1886.

14. That the plaintiff is entitled to the use and enjoyment of 645 inches of the waters of Rattlesnake Creek, statutory measure, of date June 1, 1887.

15. That the defendant James S. Kemp is entitled to the use and enjoyment of 100 inches of the waters of Rattlesnake Creek, statutory measure, of date June 1, 1888.

16. That the defendants H. C. Hollenbeck, Wallace P. Smith, Elmer Hughes, C. M. Owen, Emma Schilling, Mary F. Nesmith, Mamie E. Murray, Ollie D. Mattison, Amanda Mattison, Rufus Stryker, Alice M. Cobban, Lena Smith, A. E. Pound, [41] H. C. Chattin, H. Hazleton, Adeline C. Biggs, Della T. Wright, Carrie B. Raymond, Beadie Moss, C. H. Moss, Effie M. Kilbourne, Thomas P. Street, A. B. Libby, W. A. Buswell, Mrs. E. H. Sherman, J. B. Frazier, J. E. Johnson, John White and Missoula County, are entitled to the use and enjoyment of an additional appropriation of 50 inches

of the waters of Rattlesnake Creek, statutory measure, of date July 1, 1888.

17. That the defendant Sebastian Effinger is entitled to the use and enjoyment of 100 inches of the waters of Rattlesnake Creek, of date October 1, 1888.

18. That the defendant William Neill is entitled to the use and enjoyment of 50 inches of the waters of Rattlesnake Creek, of date August 29, 1890.

19. That the defendant George Duncan is entitled to the use and enjoyment of 50 inches of the waters of Rattlesnake Creek, statutory measure, of date May 15, 1892.

20. That the defendant Charles E. Williams, Otto Quast, Elmer Hughes, Ollie D. Mattison, Mary F. Nesmith, Jeanette Stich, John White and John G. Johnson are entitled to the use and enjoyment of 393 inches of the waters of Rattlesnake Creek, statutory measure, of date August 16, 1895.

21. That the defendants R. M. Cobban, W. H. Raymond, Charles E. Williams, William Neill, Jacob G. Ambrose, H. C. Chattin, C. W. Chattin, B. F. Chattin, J. W. Chattin, L. W. Barrett, E. J. Clements and John Capp are entitled to the use and enjoyment of 341 inches of the waters of Rattlesnake Creek, statutory measure, of date September 1, 1895.

22. That the defendants W. R. Hamilton, H. E. Day and R. E. Brandt are entitled to the use and enjoyment of 75 inches of the waters of Rattlesnake Creek, and that the defendants Lucretia Worden, Lucina Worden Sterling, Henry O. Worden, [42]

Caroline Worden Dixon, Louise Worden Bradley, Frank L. Worden, Horace B. Worden and Ruth M. Worden are entitled to the use and enjoyment of 40 inches of the waters of Rattlesnake Creek, statutory measure, and both of date August 29, 1898.

23. That the defendants A. E. Franklin is entitled to the use and enjoyment of 100 inches of the waters of Rattlesnake Creek, statutory measure, of date July 25, 1901.

THE PREMISES CONSIDERED, it is ordered, adjudged and decreed, and this doth order, adjudge and decree that the rights and priorities of the several parties to this action to the use of the said waters of Rattlesnake Creek be and the same are hereby fixed according to the amounts and dates as above ascertained in the findings of fact and conclusions of law, which findings of fact and conclusions of law are hereby referred to and made a part of this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the several parties to this action, and their successors in interest, and their agents, servants and employes, and all persons acting by, through or under them, be and they are hereby perpetually enjoined from in any manner interfering with the rights of each of the other parties as herein established.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties to this action be and he is hereby required to construct a measuring box and headgate at the head of his ditch

so that the water that each is entitled to under the terms and provisions of this decree can at any time be measured thereby.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the water hereby decreed to each of the parties is to be measured in the manner provided by the statutes of Montana. [43]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that none of the parties hereto shall recover costs, but that each of said parties shall bear the costs incident to establishing his rights.

Done in open court this 9th day of July, 1903.

FREDERICK C. WEBSTER,

Judge.

(Filed: July 9th, 1903. [44])

EXHIBIT "B"

All that portion of land in Lot Four (4) and the Southeast Quarter of the Northwest Quarter, (SE $\frac{1}{4}$ NW $\frac{1}{4}$), of Section One (1), Township Thirteen (13), North of Range Nineteen (19), West of the Montana Meridian, lying south of the "Hogback" or ridge dividing the waters that flow north into Woods Gulch, and in Lot Four (4) consisting of about Fifteen (15) Acres, more or less, and in the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) about Twenty-five (25) Acres, more or less, or a total of about Forty (40) Acres, more or less; said Hogback or ridge crosses the west line of said Section One (1) about 800 feet north of the South-

west corner of said Lot Four (4) and runs in a southeasterly direction to about the southeast corner of said Lot Four (4) and, continuing southeasterly in the same direction generally across the said southeast quarter of the northwest quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$) of Section One (1).

The Southwest Quarter ($SW\frac{1}{4}$), the Southeast Quarter ($SE\frac{1}{4}$), and the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ $NW\frac{1}{2}$), of Section One (1), Township Thirteen (13), North of Range Nineteen (19) West, containing Three Hundred Sixty (360) Acres, more or less.

The South Half of the Southeast Quarter of the Northwest Quarter of the Southeast Quarter ($S\frac{1}{2}$ $SE\frac{1}{4}$ $NW\frac{1}{4}$ $SE\frac{1}{4}$) of Section Eleven (11), Township Thirteen (13), North of Range Nineteen (19) West, containing Five (5) Acres, more or less.

The North Half of the Southwest Quarter of the Southeast Quarter ($N\frac{1}{2}$ $SW\frac{1}{4}$ $SE\frac{1}{4}$), and the Southeast Quarter of the Southwest Quarter of the Southeast Quarter ($SE\frac{1}{4}$ $SW\frac{1}{4}$ $SE\frac{1}{4}$), of Section Eleven (11), Township Thirteen (13), North of Range Nineteen (19) West, containing Thirty (30) Acres, more or less.

The Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Eleven (11), Township Thirteen (13), North of Range Nineteen (19) West, containing Forty (40) Acres, more or less.
containing FortC

The North Half of the Northeast Quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$), the North Half of the Northwest Quarter

(N $\frac{1}{2}$ NW $\frac{1}{4}$), The Southwest Quarter (SW $\frac{1}{4}$), and the Southeast Quarter (SE $\frac{1}{4}$), of Section Twelve (12), Township Thirteen (13), North of Range Nineteen (19) West, containing Four Hundred Eighty (480) Acres, more or less.

The Northwest Quarter (NW $\frac{1}{4}$), the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$), and the West Half of the Southwest Quarter (W $\frac{1}{2}$ SW $\frac{1}{4}$), of Section Thirteen (13), Township Thirteen (13), North of Range Nineteen (19) West, containing Two Hundred Twenty (220) Acres, more or less.

Beginning at the northeast corner of the Northeast quarter (NE Cor. of NE $\frac{1}{4}$), of Section Fourteen (14), Township Thirteen (13), North of Range Nineteen (19) West, and running thence south on the east side line of said quarter a distance of 40 rods to the northeast [45] corner of the tract to be conveyed and running thence west on a line parallel with the north side line of said quarter a distance of 80 rods, more or less, to the west line of the northeast quarter of said Section Fourteen (14); thence running south on the west line of said forty acre tract a distance of six (6) rods; thence running east 80 rods, more or less, to the east line of said quarter; thence running north six (6) rods to the place of beginning, containing three (3) acres, more or less.

Also beginning at the Southwest corner of the Northeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$

NE $\frac{1}{4}$) of Section Fourteen (14), Township Thirteen (13), North of Range Nineteen (19) West, and running thence north along sub-division line a distance of 625 feet to a point which is the southwest corner of the tract to be conveyed, and running thence north along said sub-division line a distance of 660 feet; thence running east parallel with the north side line of said quarter a distance of 80 rods, more or less, to the east side line of said quarter; thence running south 660 feet; thence running west 80 rods, more or less, to the Southwest corner of the tract to be conveyed, and containing Twenty (20) Acres, more or less.

The Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$), the East Half of the Southeast Quarter (E $\frac{1}{2}$ SE $\frac{1}{4}$), and Lot One (1), of Section Two (2), Township Thirteen (13), North of Range Nineteen (19) West, containing One Hundred Forty-eight and $\frac{23}{100}$ (148.23) Acres, more or less.

The total acreage of the foregoing descriptions being about Thirteen Hundred and Fifty-six (1356) Acres.

[Endorsed]: Complaint filed Aug. 18, 1933. [46]

Thereafter, on September 6, 1933, Motion to Dismiss was duly filed herein, in the words and figures following, to-wit: [47]

[Title of Court and Cause.]

MOTION TO DISMISS.

Comes now the defendant in the above entitled action and moves the court to dismiss said action upon the ground and for the reason:

I.

That the same does not state facts sufficient to constitute a valid cause of action in equity against the defendant.

W. L. MURPHY,
A. N. WHITLOCK,
JOHN E. CORETTE, Jr.

Missoula, Montana,
Attorneys for Defendant.

Service of the foregoing motion accepted and receipt of copy acknowledged this 5th day of September, 1933.

S. P. WILSON, &
E. C. MULRONEY,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 6, 1933. [48]

Thereafter, on October 18, 1933, the Motion to Dismiss herein was by the court denied, the record thereof being in the words and figures following, to-wit:

No. 1488, Jackson C. Sain et al. vs. Montana Power Co.

By agreement of counsel for the respective parties, Mr. E. C. Mulroney appearing for plaintiffs and Mr. W. L. Murphy for defendant, the motion to dismiss herein was submitted without argument; whereupon court ordered that said motion be denied, defendant granted until Oct. 21, 1933, to answer, and case set for trial Oct. 25, 1933, at 9:30 A. M.

Entered in open court October 18, 1933.

C. R. GARLOW,

Clerk. [49]

Thereafter, on October 18, 1933, Answer was duly filed herein, in the words and figures following, to wit: [50]

[Title of Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and for an answer to the complaint of the plaintiffs filed therein admits, denies and alleges as follows:

I.

Admits that the plaintiffs are citizens and residents of Missoula County, Montana, and admits that the defendant is a [51] corporation organized and existing under the laws of the State of New Jersey. Denies that the amount in controversy exceeds \$3000.00.

II.

Admits that Missoula County is a body politic and corporate, existing under the laws of Montana. Admits that Missoula Ice Company is a Montana corporation, and that defendant is a New Jersey corporation.

III.

Admits that Rattlesnake Creek, referred to in the complaint, is a stream of fresh water rising in the mountains north of Missoula, Missoula County, Montana, and flowing in a southerly direction to the Missoula River in said county.

IV.

Admits that on the 26th day of July, 1904, in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, in Cause No. 1953, wherein Missoula Water Company was plaintiff, and Charles E. Williams, and others, were defendants, a decree was duly given, made and entered, adjudicating the waters of said Rattlesnake Creek and determining the respective rights and priorities with reference thereto, and admits that "Exhibit A" made a part of the plaintiffs' complaint is a copy of said decree. In making this admission the defendant assumes that the date of the decree intended to be alleged was July 9, 1903, instead of July 9, 1930, as written in the copy of the complaint served upon this defendant.

V.

Admits that the court, among other findings, made Findings of Fact Nos. 1, 2, and 9, set out in Par-

agraph V of the complaint, and in this connection alleges that the court [52] made other findings awarding various other rights to Missoula Water Company, plaintiff in that case, all of which are set out in the copy of the decree attached to the plaintiffs' complaint. Admits that the defendant claims ownership of the rights described in said findings 1, 2 and 9, and alleges in that regard that it is the successor in interest of said Missoula Water Company and as such is the owner of said rights and all other rights awarded to Missoula Water Company under said decree, and admits that it has assumed possession of said rights and has to the extent necessary to meet its needs and to the extent authorized by said decree, diverted and used the waters of Rattlesnake Creek.

VI.

Admits that the right described in Finding of Fact No. 1 was appropriated through a ditch known as the Mill Ditch, but denies that at the time of and subsequent to the said decree in Cause No. 1953, the water so appropriated was diverted through said Mill ditch, and alleges that Cause No. 1953 was tried upon the assumption by the parties thereto that the water adjudicated to the plaintiff for use for furnishing the city and inhabitants of the city of Missoula, including said right, would and could be diverted at a single point, namely, the present point of diversion from Rattlesnake Creek, and that at the time the decree in said cause was made and entered the necessary works for such

diversion had been constructed and the water required to serve the city and inhabitants of the City of Missoula was being diverted at said point and has since been so diverted, and while a portion of the water so adjudicated to the said Missoula Water Company was for a time after said decree diverted through the said Mill ditch, such [53] diversion was thereafter discontinued more than twenty years prior to the bringing of this action, and at the date of said decree, and at all times since, said right to the extent necessary for furnishing the city of Missoula and its inhabitants was and is diverted at the present point of diversion, all as set forth hereinafter in defendant's first separate defense.

Admits that the right described in Finding of Fact No. 2 was appropriated through what is called the original Higgins ditch out of said Rattlesnake Creek, but denies that at the time of and subsequent to the said decree in Cause No. 1953, the water so appropriated was diverted through said Higgins ditch, and alleges that Cause No. 1953 was tried upon the assumption by the parties thereto that the water adjudicated to the plaintiff for use for furnishing the city and inhabitants of the city of Missoula, including said right, would and could be diverted at a single point, namely, the present point of diversion from Rattlesnake Creek, and that at the time the decree in said cause was made and entered the necessary works for such diversion had been constructed and the water required to serve the city and inhabitants of the City of Missoula was being diverted at said point and has since been

so diverted, and while a portion of the water so adjudicated to the said Missoula Water Company was for a time after said decree diverted through the said Higgins ditch, such diversion was thereafter discontinued more than twenty years prior to the bringing of this action, and at the date of said decree, and at all times since, said right to the extent necessary for furnishing the city of Missoula and its inhabitants, was and is diverted at the present point of diversion, all as set forth in defendant's first separate defense. [54]

Admits that the water right described in Finding of Fact No. 9, was appropriated through what is called the Higgins Ditch Enlarged, out of Rattlesnake Creek, but denies that at the time of and subsequent to the said decree in Cause No. 1953, the water so appropriated was diverted through said Higgins ditch enlarged, and alleges that Cause No. 1953 was tried upon the assumption by the parties thereto that the water adjudicated to the plaintiff for use for furnishing the city and inhabitants of the city of Missoula, including said right, would and could be diverted at a single point, namely, the present point of diversion from Rattlesnake Creek, and that at the time the decree in said cause was made and entered the necessary works for such diversion had been constructed and the water required to serve the city and inhabitants of the city of Missoula was being diverted at said point and has since been so diverted, and while a portion of the water so adjudicated to the said Missoula Water Company was for a time after said decree diverted

through the said Higgins ditch enlarged, such diversion was thereafter discontinued more than twenty years prior to the bringing of this action, and at the date of said decree, and at all times since, said right to the extent necessary for furnishing the city of Missoula and its inhabitants, was and is diverted at the present point of diversion, all as set forth hereinafter in defendant's first separate defense.

Admits that Mill ditch, referred to, tapped the Rattlesnake Creek about a quarter of a mile above its mouth, and admits that the said Higgins ditch tapped said Creek at a point about two miles above the mouth thereof.

Save as in this paragraph admitted the defendant [55] denies the allegations of Paragraph VI of said complaint.

VII.

Admits that the defendant claims to be, and alleges that it is the successor in interest of The Missoula Water Company, the plaintiff in Cause No. 1953, in the ownership of the water, water rights, and appropriations decreed to said The Missoula Water Company in said cause, and admits that it now takes possession of and uses the water as adjudicated in said rights and the other rights of The Missoula Water Company as fixed in said decree to the extent necessary to satisfy its needs. The defendant denies that it or any of its predecessors did subsequent to the 9th day of July, 1903, or at any other time, or at all, abandon any of the water rights described in the plaintiffs' complaint,

or any other water rights awarded to it or its predecessors by the decree in said cause, or to which it or its predecessors in interest were entitled from Rattlesnake Creek.

Save as in this paragraph admitted the defendant denies the allegations of Paragraph VII of said complaint.

VIII.

The defendant denies that there have been any wrongful acts on its part as alleged in Paragraph VIII of the complaint, and denies that the defendant or its grantors or predecessors in interest, or any of them, at any time abandoned said Mill ditch or any appropriation of water made through the same, or any other appropriation of water made from Rattlesnake Creek, and denies that defendant or any of its predecessors at any time abandoned any part of the water right described in Finding of Fact No. 1, but does allege that at the time of the decree in said cause, and since said time, it and [56] its predecessors have diverted said water to the extent required at the present location of defendant's dam and works, which is at a point higher up said Rattlesnake Creek than the head of said Mill ditch. That the extent of such diversion and the facts relating thereto, are fully set forth hereinafter in the defendant's first affirmative defense. Denies that the water right described in Finding of Fact No. 1 was appropriated or decreed to be taken at the head of said Mill ditch and not elsewhere.

The defendant denies that there have been any wrongful acts on its part as alleged in Paragraph VIII of the complaint, and denies that the defend-

ant or its grantors or predecessors in interest, or any of them, at any time abandoned said Higgins ditch or any appropriation of water made through the same, or any other appropriation of water made from Rattlesnake Creek, and denies that defendant or any of its predecessors at any time abandoned any part of the water right described in Finding of Fact No. 2, but does allege that at the time of the decree in said cause, and since said time, it and its predecessors have diverted said water to the extent required at the present location of defendant's dam and works, which is at a point higher up said Rattlesnake Creek than the head of said Higgins ditch. That the extent of such diversion and the facts relating thereto, are fully set forth hereinafter in the defendant's first affirmative defense. Denies that the water right described in Finding of Fact No. 2 was appropriated or decreed to be taken at the head of said Higgins ditch and not elsewhere.

The defendant denies that there have been any wrongful acts on its part as alleged in Paragraph VIII of the [57] complaint, and denies that the defendant or its grantors or predecessors in interest, or any of them, at any time abandoned said Higgins ditch enlarged, or any appropriation of water made through the same, or any other appropriation of water made from Rattlesnake Creek, and denies that defendant or any of its predecessors at any time abandoned any part of the water right described as Finding of Fact No. 9, but does allege that at the time of the decree in said cause, and since said time,

it and its predecessors have diverted said water to the extent required at the present location of defendant's dam and works, which is at a point higher up said Rattlesnake Creek than the head of said Higgins ditch enlarged. That the extent of such diversion and the facts relating thereto, are fully set forth hereinafter in the defendant's first affirmative defense. Denies that the water right described in Finding of Fact No. 9 was appropriated or decreed to be taken at the head of said Higgins ditch enlarged and not elsewhere.

Save as in this paragraph admitted the defendant denies the allegations of Paragraph VIII of said complaint.

IX.

Admits that the plaintiffs Jackson C. Sain and Hettie Sain are the owners of and in the possession of the lands described as belonging to them in Paragraph IX of the plaintiffs' complaint.

Denies that plaintiff Ed Ray is the owner of the land described as belonging to him in said paragraph, and alleges on information and belief that the ownership of said property is in Charles B. Effinger.

Denies that plaintiff Joseph H. McDonald is the owner of any of the lands described in "Exhibit B" attached to [58] the complaint, and alleges upon information and belief that the Federal Land Bank of Spokane is such owner.

Admits that plaintiff Missoula County is the owner of and in possession of the land described in Paragraph IX as belonging to it, with the exception of 8.09 acres thereof, which defendant is

informed and believes and therefore alleges has been conveyed by it to Tennie E. Greenough.

Admits that the plaintiff Tennie E. Greenough is the owner of and in possession of the lands described in Paragraph IX as belonging to her.

Admits that plaintiffs Clara Pidge and W. T. Burnett are the owners of and in possession of the lands described in Paragraph IX as belonging to them.

Denies that plaintiffs George Cromwell and Glen Sticht are the owners of the land described in Paragraph IX as belonging to them, and allege on information and belief that the title to said property is in Glen Sticht alone.

Admits that plaintiff C. W. Leaphart is the owner of and in possession of the land described in Paragraph IX as belonging to him.

Admits that plaintiff Josephine Youngquist is the owner of and in possession of the land described in Paragraph IX as belonging to her.

Admits that plaintiff Harry E. Stetson is the owner of and in possession of the land described in Paragraph IX as belonging to him, except his ownership is denied as to the south 38 feet of Lot 6 of Cobban Camp Sites.

Admits that plaintiff A. M. Rogers is the owner of and in possession of the lands described in Paragraph IX as belonging to him. [59]

Admits that plaintiff I. E. Peterson is the owner of and in possession of the lands described in Paragraph IX as belonging to him.

Denies that plaintiffs H. E. Sturm and Minnie L. McCann are the owners of or entitled to possession of the lands described in Paragraph IX as belonging to them.

Admits that plaintiff A. L. Kagle is the owner of and in possession of the lands described in Paragraph IX as belonging to him.

Admits that plaintiff Israel Q. Roberts is the owner of and in possession of the lands described in Paragraph IX as belonging to him.

Admits that plaintiff William J. Johnson is the owner of and in possession of the lands described in Paragraph IX as belonging to him.

As to the lands described in Paragraph IX as belonging to Horace A. Green and Pearl Green, the defendant denies the allegations with reference thereto, and alleges upon information and belief that the title is in Pearl Green alone.

Admits that plaintiffs W. D. Satterfield and Margaret A. Satterfield are the owners of and in possession of the lands described in Paragraph IX as belonging to them.

Admits that plaintiff Ellen R. Whiting is the owner of the lands described in Paragraph IX as belonging to E. F. Roth and Ellen R. Whiting, and denies the allegation in said paragraph as to the ownership of Roth.

Admits that plaintiff Charles E. Lucas is the owner of the lands described in Paragraph IX as belonging to L. A. Wagoner and Charles E. Lucas, and denies the allegations of said paragraph as to the ownership of Wagoner. [60]

Admits that plaintiffs Charles A. Martinson and Freda Martinson, doing business under the firm name of Missoula Ict Company, are the owners of and in possession of the lands described in Paragraph IX as belonging to them.

Admit that plaintiffs Orpha Miller Talbott and Russell W. Miller are the owners of and in possession of the lands described in Paragraph IX as belonging to them.

Admits that the lands of the plaintiffs are in each instance to some extent agricultural in character, requiring water for irrigation, but denies that all of said lands are of such character.

X.

Answering Paragraph X of plaintiffs' complaint the defendant admits that Missoula County is the owner of a portion of rights No. 10 and 16, as adjudicated by said decree in Cause No. 1953, and admits upon information and belief that the extent of said right is 36 inches. As to all of the other plaintiffs named in said paragraph defendant denies that they, or any of them, are entitled to the rights alleged, and denies all the allegations of said paragraph with reference thereto.

XI.

The defendant denies that the place of diversion of water by the several plaintiffs is near the north line of Township 13 North of Range 19 West.

XII.

The defendant denies that at the times mentioned in the plaintiffs' complaint, or at any time, water sufficient to supply 946 inches, or any other amount, at the head of said Mill ditch rose in Rattlesnake Creek below the points of diversion of plaintiffs, and denies that there was during said times sufficient water flowing in said creek at the head of the Mill ditch to supply the water described in Finding of Fact [61] No. 1 if the rights claimed by the plaintiffs were used, and denies that 946 inches of the water of said stream, or any other portion of the right described in Finding of Fact No. 1 flowed to waste out of the mouth of said creek at any time when water was required along said stream for beneficial purposes. Admits that during the seasons 1931, 1932 and 1933, the defendant diverted from Rattlesnake Creek at its present point of intake located a little less than one-half mile south of the north line of Township 13 North of Range 19 West, such water as was required by it to supply the needs of the city of Missoula and its inhabitants, and admits that the defendant claimed, and still claims, the right to make such diversion to the extent needed from the right described in said Finding of Fact No. 1. That the extent and character of said use is fully set forth hereinafter in the defendant's first affirmative defense. Defendant denies that it did at said times, or at any time, deprive the plaintiffs, or any of them, of any water to the use of which they or any of them were entitled. Denies that the diver-

sion of said water at said point has resulted in any injury whatsoever to the plaintiffs, or any of them.

The defendant denies all allegations of Paragraph XII not specifically admitted or denied in this paragraph.

XIII.

The defendant denies that at the times mentioned in the plaintiffs' complaint, or at any time, water sufficient to supply 160 inches, or any other amount, at the head of said Higgins ditch rose in Rattlesnake Creek below the points of diversion of plaintiffs, and denies that there was during said time sufficient water flowing in said creek at the head of the Higgins ditch to supply the water described in Finding of Fact [62] No. 2 if the rights claimed by the plaintiffs were used, and denies that 160 inches of the water of said stream, or any other portion of the right described in Finding of Fact No. 2 flowed to waste out of the mouth of said creek at any time when water was required along said stream for beneficial purposes. Admits that during the seasons 1931, 1932 and 1933, the defendant diverted from Rattlesnake Creek at its present point of intake located a little less than one-half mile south of the north line of Township 13 North of Range 19 West, such water as was required by it to supply the needs of the city of Missoula and its inhabitants, and admits that the defendant claimed, and still claims, the right to make such diversion to the extent needed from the right described in said Finding of Fact No. 2. That the extent and character of said

use is fully set forth hereinafter in the defendant's first affirmative defense. Defendant denies that it did at said times, or at any time, deprive the plaintiffs, or any of them, of any water to the use of which they or any of them were entitled. Denies that the diversion of said water at said point has resulted in any injury whatsoever to the plaintiffs, or any of them.

The defendant denies all allegations of Paragraph XIII, not specifically admitted or denied in this paragraph.

XIV.

The defendant denies that at the times mentioned in the plaintiffs' complaint, or at any time, water sufficient to supply 348 inches, or any other amount, at the head of said Higgins ditch enlarged rose in Rattlesnake Creek below the points of diversion of plaintiffs, and denies that there was during said time sufficient water flowing in said creek at the head of [63] the Higgins ditch enlarged to supply the water described in Finding of Fact No. 9 if the rights claimed by the plaintiffs were used, and denies that 348 inches of the water of said stream, or any other portion of the right described in Finding of Fact No. 9 flowed to waste out of the mouth of said creek at any time when water was required along said stream for beneficial purposes. Admits that during the seasons 1931, 1932, and 1933, the defendant diverted from Rattlesnake Creek at its present point of intake located a little less than one-half mile south of the north line of Township

13 North of Range 19 West, such water as was required by it to supply the needs of the city of Missoula and its inhabitants, and admits that the defendant claimed, and still claims, the right to make such diversion to the extent needed from the right described in said Finding of Fact No. 9. That the extent and character of said use is fully set forth hereinafter in the defendant's first affirmative defense. Defendant denies that it did at said times, or at any time, deprive the plaintiffs, or any of them, of any water to the use of which they or any of them were entitled. Denies that the diversion of said water at said point has resulted in any injury whatsoever to the plaintiffs, or any of them.

The defendant denies all allegations of Paragraph XIV not specifically admitted or denied in this paragraph.

XV.

The defendant denies that if it diverted its requirements of water at the heads of the said Mill ditch and Higgins ditch there would be any more water available in Rattlesnake Creek at any point for the plaintiffs, or any of them, and denies that the defendant by diverting water at the point where it now diverts [64] it about one-half mile south of the north line of Township 13 North of Range 19 West, deprives plaintiffs, or any of them, of any water from Rattlesnake Creek to the use of which they are entitled, and denies that by said diversion it causes any water to go to waste which could otherwise be utilized. Defendant admits that during the irrigation season of 1931, 1932, and 1933, it

diverted the water necessary to supply the requirements of the city of Missoula and its inhabitants at the point above located, but denies that by so doing it deprived the plaintiffs, or any of them, of water from Rattlesnake Creek to the use of which they were entitled, or that it did them any damage or injury.

Save as in this paragraph specifically admitted or denied, the defendant denies all other allegations of Paragraph XV of plaintiffs' complaint.

XVI.

The defendant admits that it claims to be, and alleges that it is the owner of the rights described in Findings of Fact numbered 1, 2 and 9 in Cause No. 1953, decreed to the Missoula Water Company, the defendant being the successor in interest of said company, and admits that it claims the right to divert said water within the limits of its adjudicated rights and to the extent necessary to supply its requirements at a point on Rattlesnake Creek a little less than one-half mile south of the north line of Township 13 North of Range 19 West, but denies that by so doing it does or will cause any damage or injury to the plaintiffs, or any of them. In this connection defendant alleges that the said point of diversion was in fact being used at the time of the entry of decree in Cause No. 1953, in which said rights are adjudicated. [65]

XVII.

The defendant denies that by its diversion at the point referred to it deprived the plaintiffs, or any of

them, of any water of Rattlesnake Creek to which they are entitled, or that it causes any damage or injury to the plaintiffs, or any of them. Denies that its right to divert water at said point is without authority of law or invalid, and denies all other allegations of Paragraph XVII. Defendant further alleges that the point of diversion to which the plaintiff refers in Paragraph XVII as a changed point is in fact the point at which water was being diverted at the time the decree in said Cause No. 1953 was entered.

XVIII.

Defendant denies that the value of the water rights of Rattlesnake Creek belonging to plaintiffs is \$25,000.00, and denies that the defendant by the diversion of the waters of Rattlesnake Creek has at any time, or now does in any way damage or injure the plaintiffs, or any of them.

XIX.

Defendant denies that the appropriations of the plaintiffs, or any of them, from Rattlesnake Creek antedate the right of the defendant to divert water at its present point of diversion, and allege in this regard that such rights as plaintiffs may have to the use of said water were adjudicated by the terms of the decree in Cause No. 1953, which is attached to the plaintiffs' complaint, and that the rights of plaintiffs' predecessors were adjudicated at the same time and in the same way, and that at the time of said decree water was being diverted by de-

fendant's predecessor at its present point of diversion, and that said cause was tried and said [66] decree entered upon the assumption that the rights of the defendant and its predecessors could and would be diverted at said point. The defendant denies that its right to divert water from Rattlesnake Creek at its present point is subsequent or junior to the rights of the plaintiffs, or any of them, and denies that it has no right to divert water at said point when plaintiffs have need of water, and denies all other allegations of Paragraph XIX, and alleges on the contrary that the defendant's rights and priorities are the same as adjudicated to the plaintiff, the Missoula Water Company, in Cause No. 1953, except as to other rights since acquired by the defendant and its predecessors not material to this controversy.

XX.

Denies that any act or conduct of the defendant referred to in the plaintiffs' complaint constitutes or is a cloud on any right or claimed right of any of the plaintiffs, and denies that any such act or conduct has interfered with or does interfere with the plaintiffs, or any of them, in any way. Denies that there is any wrong, damage or injury resulting to any of the plaintiffs.

XXI.

Except as herein specifically admitted or denied, the defendant denies all of the allegations of the plaintiffs' complaint. [67]

FOR A FURTHER ANSWER AND FIRST SEPARATE DEFENSE TO THE PLAINTIFFS' COMPLAINT THE DEFENDANT ALLEGES:

I.

That it is and since long prior to its acquisition of the water rights and water system hereinafter referred to, has been a corporation organized and existing under and by virtue of the laws of the state of New Jersey, authorized to engage in, and actually engaging in business in the state of Montana. That it is the successor in interest of The Missoula Water Company, a corporation, and as such has succeeded to all the property, rights and interest of that company in so far as the same consist of the right to use the water from Rattlesnake Creek and the distribution system and works used for supplying water to the City of Missoula and its inhabitants. That the defendant and its predecessors is and were public utilities at all times herein referred to, engaged in the business of providing a suitable water supply for domestic, irrigation and other beneficial purposes to the city of Missoula, Montana, and its inhabitants, and for fire protection in said city, and having the right of eminent domain. That in the furnishing of such water supply this defendant is the owner, and its predecessors in interest were the owners of the distribution system used for the distribution of water in Missoula and the reservoir, pipes, dam, and other works for the diversion, purification and distribution for consumption by members of the public of water in said city.

II.

That prior to the year 1903 the said The Missoula Water Company, predecessor in interest of this defendant, instituted as plaintiff a certain action in the District Court [68] of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, the same being Cause No. 1953, and that C. E. Williams and many others were the defendants therein. That said action was brought for the purpose of adjudicating the waters of Rattlesnake Creek, being the stream referred to in the plaintiffs' complaint, and that decree was duly made and given in said action on the 26th day of July, 1904, copy of which decree is attached to the plaintiffs' complaint and made a part of it. That by the terms of said decree the plaintiff in said cause was awarded right No. 1 out of said stream, entitling it to the use of 946 inches as of April 1, 1866; right No. 2, entitling it to the use of 160 inches as of November 16, 1868; right No. 3, entitling it to the use of 13½ inches as of April 1, 1871; a part of right No. 4, entitling it to the use of 65 inches as of May 1, 1871; a part of right No. 8, entitling it to the use of 46½ inches as of April 1, 1881; right No. 9, entitling it to the use of 348 inches as of May 1, 1881; right No. 14, entitling it to the use of 645 inches as of June 1, 1887. That since the entry of said decree the defendant's predecessors have acquired by purchase a portion of right No. 5 under said decree, giving the right to use 115 inches of water as of April 15, 1872; right No. 11, giving the right to the

use of 130 inches of water as of October 8, 1882; right No. 19, giving the right to the use of 50 inches of water as of May 15, 1892; a portion of right No. 20, giving it the right to the use of 65 inches as of August 16, 1895; and a part of right No. 21, giving it the right to the use of 142 inches as of September 1, 1895. That the defendant as successor in interest of its predecessors is now the owner of all of said rights to the use of water from [69] Rattlesnake Creek, including those adjudicated to The Missoula Water Company, as above set forth, and also those since acquired by the defendant's predecessors in interest.

III.

That the purpose for which the water was appropriated by and decreed to the said plaintiff in said cause was to furnish a suitable water supply to the city of Missoula, Montana, a municipal corporation, for fire protection and other proper city purposes, and likewise to furnish a suitable water supply to the inhabitants of said city for domestic, irrigation and other purposes, and that said water rights at said time, and since, were and have been the only source of supply for said city and its inhabitants. That the plaintiff in its amended complaint in said action prayed for the right to take from said Rattlesnake Creek at one place all of the water to which it was found to be entitled, and that all of the plaintiffs in this action or their predecessors in interest were parties to said action, namely, Cause No. 1953, and that no objection was made in any of the answers

to the granting of such prayer. That said cause was tried upon the assumption that the said plaintiff could divert the rights adjudicated to it at one point, and that no controversy existed between the parties as to that question. That when the decree in said cause was signed and filed a dam had been constructed in Rattlesnake Creek at a point approximately one-half mile south of the north line of Township 13 North of Range 19 West, for the purpose of diverting the water from said stream which might be adjudicated to the said plaintiff, and that there had likewise been constructed a pipe line leading from the said dam to a reservoir, which was likewise constructed, and that all of said [70] works for the diversion, purification and distribution of said water to the city of Missoula and its inhabitants had been completed and the water necessary for such purpose was at the time of said decree, and prior thereto, being diverted at said point by defendant's predecessor in interest, and furnished to the city of Missoula and its inhabitants, and it has since been so furnished continuously. That the amount required for such purpose at said time was less than the amount adjudicated under rights No. 1, No. 2 and No. 9, by said decree. That prior to the construction of the dam and works herein referred to, the right designated in said decree as right No. 1, was partially diverted through what was known as the Mill ditch, which was located down stream from the point where said dam was located, and that the rights designated as No. 2 and No. 9 were partially

diverted through what is known as the Higgins ditch, likewise located down stream from said point, and that prior to the construction of said dam the total amount of water embraced in rights No. 1, No. 2 and No. 9, was diverted through said ditches and through other ditches, flumes and pipes and utilized at and beyond the city of Missoula, and none of it was returned to Rattlesnake Creek, and none of it was available after its use by the appropriators for use by any of the plaintiffs or their predecessors in interest. That after the construction of said dam, as herein alleged, the rights referred to in Findings No. 1, No. 2, and No. 9, and the other rights awarded to defendant's predecessors by said decree, were to the extent necessary to furnish the city of Missoula and its inhabitants diverted at the point where said dam was located, and that by consolidating said rights [71] and diverting them at said point and carrying the water from said dam through a pipe to the reservoir and distribution system, the amount of water required to satisfy the needs of defendant and its predecessors was much less than the amount required to satisfy rights No. 1, 2 and 9, when the same were taken out through the Mill and Higgins ditches, and other ditches, flumes and pipes and that the burden on the stream resulting from such diversion at one point greatly decreased the amount of water required to be diverted by the defendant and its predecessors to satisfy their needs, and greatly increased the amount of water available from said stream for use by the plaintiffs and their predeces-

sors herein, and that such condition has continued from said time to the present, and still continues.

IV.

That for some time after the diversion at said dam, as herein alleged, a portion of the said right No. 1 continued to be diverted through said Mill ditch, and a portion of rights No. 2 and 9 continued to be diverted through said Higgins ditch, but such uses were gradually discontinued and were entirely discontinued more than twenty years prior to the bringing of this action, and the use of said rights, and all rights to which the defendant and its predecessors were and are entitled to the extent that the same have been necessary to satisfy the requirements of the city of Missoula and its inhabitants, have been diverted at the present point of diversion at said dam and used for said purposes. That in establishing a single point of diversion at said dam the defendant and its predecessors did not intend to, and did not abandon any of the rights to which they were entitled, but established such point of diversion for the purpose of conserving the waters of said [72] stream and more efficiently serving the city of Missoula, and not otherwise.

V.

That the rights to the waters of said Rattlesnake Creek were adjudicated by said decree in said Cause No. 1953, and such adjudication was made in the light of the existing fact that the rights of

the plaintiff in said cause were at the time of decree being diverted and used at a single point of diversion, which is the present point of diversion. That since said time the plaintiffs and their predecessors in interest have acquiesced in the diversion of the water required by the defendant and its predecessors at said point of diversion and the waters of said stream have since that date been distributed annually by water commissioners appointed by the court having jurisdiction in the premises to distribute said water and the rights of defendant and its predecessors have been distributed at said point. The defendant alleges that its right to divert water is superior and prior to the rights of the plaintiffs and their predecessors to the extent fixed and determined in said decree in said Cause No. 1953, and that the water diverted by defendant and its predecessors has at no time exceeded but has at all times been less than the amount as to which priority was given to defendant's predecessor in said decree, and that the method and place of diversion followed by defendant and its predecessors, as herein alleged, has been and is to the advantage and benefit of the plaintiffs and their predecessors in interest, and that the plaintiffs have no just ground of complaint. [73]

FOR A FURTHER ANSWER AND SECOND SEPARATE DEFENSE THE DEFENDANT ALLEGES:

I.

That it is a New Jersey corporation authorized to do business in Montana, and a public utility owning and operating a dam, reservoir and purification

system, pipe lines and distribution system for the furnishing of water to the city of Missoula and its inhabitants, and having the power of eminent domain. That its predecessors before it were likewise public utilities, owners of the same system, and engaged in operating it.

II.

That the defendant is the successor in interest of The Missoula Water Company, a corporation, which was the plaintiff in that certain cause No. 1953, in the District Court of the Fourth Judicial District of the State of Montana, in and for the county of Missoula, which action was brought to adjudicate the waters of Rattlesnake Creek referred to in the plaintiff's complaint, and that final decree in said cause was made and entered on the 26th day of July, 1904, a copy thereof being attached to the plaintiffs' complaint, which decree by its terms adjudges The Missoula Water Company, defendant's predecessor, to be entitled to certain rights from said stream including the rights designated by the plaintiffs as No. 1, No. 2, and No. 9, as set forth in said decree.

III.

That at the time of said decree the rights of defendant's said predecessor in interest, including said rights last referred to, to the extent necessary to supply the city of Missoula and its inhabitants, were being diverted at a point on said stream about one-half mile south of the north line of [74] Township 13 North of Range 19 West, Montana Meridian, the same being the point of location of defendant's diversion dam, and that said water has since prior

to the date of said decree been continuously diverted at said point and used for said purpose.

IV.

That while the defendant claims that its rights to the waters of said stream and the rights of its predecessors thereto have been and are superior and prior to the rights of the plaintiffs, or any of them, or any of their predecessors, and that their right to divert their requirements up to the amounts fixed in said decree at the said present point of diversion has at all times existed, and still exists, the defendant alleges that such diversion by it and its predecessors in interest at said point, and such use, has been for a period of more than thirty years continuous, open, notorious, exclusive, uninterrupted, under claim of right, and adverse to the plaintiffs and their predecessors and all other persons, and the defendant alleges that by reason of these facts, if not otherwise, defendant's right to the use of the waters of said stream from said point of diversion in so far as necessary to satisfy the requirements of the defendant in furnishing the city of Missoula and its inhabitants is superior to the right of any of the plaintiffs or their predecessors.

[75]

FOR A FURTHER ANSWER AND THIRD SEPARATE DEFENSE, THE DEFENDANT ALLEGES:

I.

That it is a New Jersey corporation authorized to do business in Montana, and a public utility

owning and operating a dam, reservoir and purification system, pipe lines and distribution system for the furnishing of water to the city of Missoula and its inhabitants, and having the power of eminent domain. That its predecessors before it were likewise public utilities, owners of the same system, and engaged in operating it.

II.

That the defendant is the successor in interest of The Missoula Water Company, a corporation, which was the plaintiff in that certain cause No. 1953, in the District Court of the Fourth Judicial District of the State of Montana, in and for the county of Missoula, which action was brought to adjudicate the waters of Rattlesnake Creek referred to in the plaintiffs' complaint, and that final decree in said cause was made and entered on the 26th day of July, 1904, a copy thereof being attached to the plaintiffs' complaint, which decree by its terms adjudges The Missoula Water Company, defendant's predecessor, to be entitled to certain rights from said stream, including the rights designated by the plaintiffs as No. 1, No. 2, and No. 9, as set forth in said decree.

III.

That at the time of said decree the rights of defendant's said predecessor in interest, including said rights last referred to, to the extent necessary to supply the city of Missoula and its inhabitants, were being diverted at a point [76] on said stream about one-half mile south of the north line of Town-

ship 13 North of Range 19 West, Montana Meridian, the same being the point of location of defendant's diversion dam, and that said water has since prior to the date of said decree been continuously diverted at said point and used for said purpose.

IV.

That each and all of the plaintiffs in this action, with the exception of Missoula County, in so far as they own either the land or the water rights claimed by them, acquired the same and all of them long subsequent to the date of the decree in said cause No. 1953, and long subsequent to the construction of the dam and other works used for the diversion and distribution of water to the city of Missoula and its inhabitants, said dam being located as alleged in Paragraph III hereof. That Missoula County and the predecessors in interest of all of the other plaintiffs in this action, were parties defendant in said Cause No. 1953.

V.

That for the purpose of diverting the water necessary to supply the needs of defendant's predecessor in interest in furnishing water to the city of Missoula and its inhabitants, the dam and intake reservoir constructed for that purpose prior to the date of said decree, as herein alleged, was constructed at a cost of more than \$20,000.00, a distribution reservoir was likewise constructed at a cost in excess of \$20,000.00, and a pipe line was laid to carry said water from said point of diversion

at a cost in excess of \$85,000.00, and necessary rights of way were acquired at a cost in excess of \$4,000.00, and all of said works were constructed for the purpose of [77] diverting at one point the water required for distribution in the city of Missoula, and including said rights No. 1, No. 2, and No. 9, to the extent that the same were necessary, and that such diversion at one point has continued ever since that time, and still continues. That since that time many hundreds of thousands of dollars have been expended by the defendant and defendant's predecessors in interest in the improvement, extension and repair of the said works, and of the distribution system used to distribute the said water in the city of Missoula, all of which expenditures have been made in reliance upon the right of the defendant and its predecessors to make and continue said diversion at said point, and upon the acquiescence of plaintiffs and their predecessors therein.

VI.

That said works, and particularly said dam and reservoir, were and are permanent structures, the dam being placed in the stream in a prominent and conspicuous location, and that its location and its purpose were at all times known to plaintiffs and plaintiffs' predecessors in interest.

VII.

That since the year 1902 when said dam was constructed, there have been at least two distinct

changes in ownership of the said water system and water rights supplying the same, such property having been conveyed by the old Missoula Water Company to Missoula Light & Water Company, and thereafter by said company and its successor Missoula Public Service Company, to this defendant, and that each of said distinct owners acquired title in reliance upon the right to use the system and diversion works as installed in 1902, and to continue the diversion of water at the point where said dam was located, and the acquiescence in and failure to object to such use by plaintiffs and their predecessors. [78]

VIII.

That substantially all of the persons who were living and in a position to know the facts, physical and otherwise, as they existed at the time when said water rights were first diverted at the one point where said dam was located, have either died or are gone from the jurisdiction, and this defendant is informed and believes and therefore states, that most if not all of such facts are now unavailable for that reason. That the evidence taken in said Cause No. 1953 cannot be found in the records of said cause, and that the defendant after searching diligently for the same is unable to find it.

IX.

That the said source of supply is the only available source from which the people of the city of Missoula may be furnished with water, and that diversion at the old points of diversion of the Mill

ditch or the Higgins ditch referred to in the plaintiffs' complaint of water for use in the distribution system supplying the city of Missoula, is not practicable or feasible.

X.

That notwithstanding the facts set forth in this separate defense the plaintiffs and their predecessors in interest, knowing the location of the point of diversion, and knowing the use to which the water has been put, and knowing the expenditures and improvements in general that have been made in distributing said water, have acquiesced in such diversion and distribution, and have allowed and permitted large sums to be expended upon said system, and have allowed and permitted the water necessary to furnish said city and its inhabitants to be diverted at the point where it was diverted at the time the decree [79] was entered in said Cause No. 1953. That this has gone on for more than thirty years, and that no action has been brought or effort made to prevent or change the use or place of diversion or to in any way alter the method of use of water from Rattlesnake employed by the defendant and its predecessors in interest, and while this defendant alleges that it and its predecessors have at all times been entitled to divert said water at the point where it has been diverted and to use the same as it has been used, it further alleges that in any event the plaintiffs and their predecessors in interest have been guilty of laches, and in equity and good conscience are precluded and estopped from obtaining any relief sought in this action.

FOR A FURTHER ANSWER AND FOURTH SEPARATE DEFENSE, THIS DEFENDANT ALLEGES:

I.

That while it denies that the plaintiffs, or any of them, have or at any time had any cause of action against the defendant, or any of its predecessors in interest, it further alleges that if the plaintiffs or their predecessors ever had any cause of action, the same arose more than five years prior to the bringing of this action, and is barred by the provisions of Section 9041 Revised Codes of Montana for 1921.

Wherefore, having fully answered, the defendant prays that the plaintiffs take nothing in this action and that the defendant recover its costs herein expended.

W. L. MURPHY

A. N. WHITLOCK

J. E. CORETTE, JR.

Attorneys for Defendant,
Missoula Montana. [80]

State of Montana,
County of Missoula.—ss.

A. N. Whitlock being first duly sworn on oath deposes and says; that he is one of the attorneys for the defendant in the above entitled action and makes this verification for and on behalf of said defendant for the reason that it is a corporation and has no officer within the county where affiant resides; that affiant has read the foregoing answer, knows the contents thereof, and that the matters

and things therein stated are true to the best of his knowledge, information and belief.

A. N. WHITLOCK

Subscribed and sworn to before me this 18th day of October, 1933.

[Seal]

LILIAN C. WENZEL

Notary Public for the State of Montana
Residing at Missoula, Montana.

My commission expires Feb. 10th, 1936.

Service of the foregoing answer accepted and receipt of copy acknowledged this 18th day of October, 1933.

E. C. MULRONEY and
S. P. WILSON,

Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 18, 1933. [81]

Thereafter, said cause was duly tried on October 25th and October 26th, 1933, the record thereof being in the words and figures following, to wit:
No. 1488, Jackson C. Sain et al. vs. Montana Power Company.

This cause came on regularly for trial this day, Mr. E. C. Mulroney and Mr. S. P. Wilson appearing for the plaintiffs, and Messrs. W. L. Murphy, A. N. Whitlock and John E. Corette Jr. appearing for defendant.

Thereupon, on motion of Mr. Whitlock, court ordered that the name of Mr. Walter L. Pope be entered as associate counsel for defendant.

Thereupon, on motion of Mr. Wilson, there being no objection, court ordered that the complaint herein be amended by interlineations as follows: On page 2, line 8, paragraph 4, change the figures "1930" to "1903".

Thereupon, on motion of Mr. Whitlock, there being no objection, court ordered that the answer herein be amended by interlineation in accordance with written amendments filed.

Thereupon Will Cave, W. H. Sweringen, Edward Ray, J. C. Sain, Russell Miller, I. Q. Roberts, Jack Ray, Joe McDonald, C. W. Leaphart, Geo. Cromwell, L. E. Tucker, Ed Newton, W. M. Hay, Henry Bergstrom, John J. Flynn, Henry Partoll, John A. Morelles and Charles E. Quast were sworn and examined as witnesses for plaintiffs and plaintiffs' exhibits 1, 2, 3, 4 and 5 introduced in evidence. Thereupon counsel orally stipulated and agreed relative to the testimony which would have been given by certain of the plaintiffs had they been called to testify, whereupon plaintiffs rested.

Thereupon H. S. Thane, J. M. Brechbill, T. T. McLeod, C. H. McLeod, C. H. Christianson, Peter Federson, J. M. Price, G. J. Hagens and W. L. Murphy were sworn and examined as witnesses for defendant, W. M. Hay was recalled as a witness by defendant and defendant's exhibits 6 to 13, inclusive, introduced in evidence. A certain written offer of proof was made by defendant, to which the plaintiffs objected, and thereupon court ordered that said objection be sustained, to which ruling of the

court the defendant then and there excepted and exception noted.

Thereupon further trial of cause was ordered continued until 9.30 A. M. tomorrow.

Entered in open court October 25, 1933.

C. R. GARLOW, Clerk.

No. 1488, Jackson C. Sain, et al. vs. Montana Power Company.

Counsel for respective parties present as before and trial of cause resumed.

Thereupon J. C. Sain and H. S. Thane were recalled as witnesses by defendant, Arthur Sticht was sworn and examined as a witness for defendant and defendant's exhibits 14 and 15 introduced in evidence, whereupon defendant rested.

Thereupon W. H. Sweringen, Russell Miller, J. C. Sain, I. Q. Roberts, Edward Ray, L. E. Tucker, Joe McDonald, and C. W. Leaphart were recalled as witnesses in rebuttal, Roscoe Jackman and E. C. Mulroney were sworn and examined as witnesses in rebuttal and plaintiffs' exhibit 16 introduced in evidence, whereupon plaintiffs rested and the evidence closed.

Thereupon defendant moved the court to dismiss the bill of [82] complaint herein for lack of proof and that plaintiffs are barred by virtue of laches in the premises, which motion was by the court taken under advisement.

Thereupon the cause was submitted to the court and taken under advisement, plaintiffs being granted 10 days in which to file their brief, and defendant to have 10 days thereafter in which to file its brief, and both sides being granted leave to submit proposed findings of fact and conclusions of law.

Entered in open court October 26, 1933.

C. R. GARLOW, Clerk. [83]

Thereafter, on February 5th, 1934, the

DECISION

of the court was duly filed herein, in the words and figures following, to wit: [84]

[Title of Court and Cause.]

This is final hearing in a suit involving the primitive, ancient and eternal struggle for the life-giving fluid, the water-holes and springs in the desert, the streams which make fruitful and to blossom as the rose the waste places of earth.

The parties are some of the appropriators of the water of Rattlesnake Creek, one of the more delightful of Montana's many beautiful streams, despite its repellant but "Western" name. As usual, appropriations exceed the flow, and as usual, just apportionment involves difficulties inciting litigation in lieu of sometime armed foray with spear or gun.

Ignoring non-essentials of strategy, camouflage and nuisance-value, the gist of the case is whether defendant's change in place of diversion of water inflicts substantial injury on any plaintiff.

The evidence discloses appropriations by defendant in amount 1184 inches prior to any plaintiff's, 160 inches more, prior to any plaintiff's save one of 45 inches, 775 inches more, prior to any plaintiff's save the aforesaid and one of 145 inches, and some subsequent unnecessary to detail.

The change involved, made in 1902, is from the Mill ditch and the Higgins ditch, both below plaintiffs, to a dam $1\frac{3}{4}$ miles above the Higgins, $3\frac{1}{2}$ miles above the Mill and 100 feet higher, and above most of plaintiffs.

The defendant is a public utility and now diverts no water save at said dam and to serve the city of Missoula. It appears defendant has not diverted more than 1112 inches or 6 inches more than its appropriations by the ditches aforesaid and prior to all plaintiffs.

Above the dam defendant has 8 reservoirs, but claims nothing here by reason of any excess water stored. The dam obstructs all flow of the stream save overflow more or less intermittent and which varies as varies the flow and diversion by defendant. Likewise varies the [85] flow below the dam.

Taking the testimony for it and particularly that of defendant's superintendent, when defendant sometime diverts all flow, the surface flow runs off and the bed of the stream dries to a short distance

above the Higgins ditch. There and below, however, the usual sub-surface flow emerges, and always affords a surface flow of water at the head of at least the Mill ditch, in amount sometime 340 inches.

In effect, the sub-surface operates as a by-pass around plaintiffs' places of diversion, and as a tributary or accretion to the stream above defendant's before the change. This water not available to any plaintiff but available to defendant at the Mill ditch if not at the Higgins ditch, is by it permitted to waste and its equivalent taken at the dam.

And this consequence of the change is the grievance and injury of which plaintiffs complain. That complaint is justified, grievance and injury real and substantial is clear, plain as a pike-staff.

A single illustration suffices.

Assume a flow of 1000 inches at the dam, defendant's need and diversion 700 inches, and overflow 300 inches. The last enters the sub-surface and only emerges where unavailable to any plaintiff but available to defendant. Obviously, had defendant not changed diversion from the ditches to the dam, the 1000 inches in surface and sub-surface flow adown the stream would supply 300 inches to plaintiffs and 700 inches, its need and so the limit of its right, to defendant at the ditches. Therefore, at that time or any other of shortage, in just apportionment this wasted water is to be charged against defendant, its diversion at the dam limited to its need (in general, always the limit of a water right when others need water, however greater the appropriation), less any

substantial flow at the head of the Higgins and/or the Mill ditch, the deduction not to exceed the extent of defendant's resort to the priorities by said ditches obtained.

In so far as diversion at the dam lessens evaporation and absorption, defendant is to be given the benefit when needed. But that is not all.

If further appears that in a suit involving these parties and all other appropriators of the water of said stream, in 1903 in the local state court was rendered a decree settling priorities in time and [86] amount, and each party was enjoined from trespass upon any other. And to this day that court maintains and exercises jurisdiction to enforce and execute its decree by its officer (water commissioner) to apportion the water and supervise its use.

If is any good reason why the parties should invoke the interposition of this court to vindicate rights by the state court adjudicated, it has not been suggested and passeth understanding.

Why a decree, injunction, and execution here, to enforce a decree, injunction and execution there? And if secured, to enforce them why not a new suit in the state court?—and so on ad infinitum, decree upon decree imposed, like Ossa on Pelion piled.

Is not that court able to visit the just penalty on this defendant or any other who in trespass violates the court's decree and injunction, and will it not do so?

To ask is to answer.

And if that court's officer does not justly apportion the water (for is no evidence defendant diverted more than he sanctioned) no doubt the court will apply the proper remedy.

It is true suit may be maintained to execute a decree in another suit in the same or another court. But only when is some valid reason, only when subsequent events interpose obstacles to otherwise execution by the court of the first decree. That is not this case.

Equity has discretion in the matter of relief, and may grant or deny it unless circumstances convert discretion into duty. Where duty begins, discretion ends. The state court and this are of concurrent jurisdiction, each from the other entitled to the respect and deference proper between equals. That court is competent as this to finish what these parties in it began.

To solicit this court to in effect supersede the state court is an affront to both, whether or not also contempt. Is this court's officer to undo what the state court's officer does, and vice versa?

The practise is bad, breeds conflict, and is intolerable.

So far has it been carried, that in the opinion in *Simmons vs. Ry. Co.*, the last of three suits involving the same stream, this court observes the three decrees result in an impasse, nullity. That is, in the first suit A is decreed prior to B, in the second suit B is decreed prior to C, and in the third suit C is

decreed prior to A,—a triple estoppel, the parties in complete circle back to the starting [87] point.

Moreover, it is settled law that suits to determine priorities in use of water partake of the quality of real actions, and so far involve a res that the court first obtaining jurisdiction of them should proceed to the determination without interference by any other court, on principles well settled between the courts of the United States and of the states.

Rickey Etc. Co. vs. Miller and Lux, 218 U. S. 262;
U. S. vs. American Etc. Assoc., 2 Fed. Sup. 867.

It is not mere matter of comity but of right. That is this case. And although neither party objected, it is the duty of the court sua sponte to avoid abuse of its authority, to refrain from invasion of the state court's jurisdiction.

Suit dismissed without costs.

BOURQUIN, J.

[Endorsed]: Filed Feb. 5, 1934. [88]

Thereafter, on April 25, 1934,

DECREE

was duly entered herein in the words and figures following, to-wit:

In the District Court of the United States in and for
the District of Montana.

No. 1488.

JACKSON C. SAIN, et al.,

Plaintiffs,

vs.

THE MONTANA POWER COMPANY,
a corporation,

Defendant.

This cause came on to be heard at this term and was submitted by counsel for decision, and thereupon, upon consideration thereof the court filed written decision therein, and in accordance therewith IT IS ORDERED, ADJUDGED and DECREED that said suit be dismissed without costs.

Dated April 25, 1934.

BOURQUIN, Judge.

[Endorsed]: Filed April 25, 1934. [89]

Thereafter, on May 3, 1934, Petition for Appeal was duly filed herein in the words and figures following, to-wit: [90]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.
[91]

The above named plaintiffs feeling themselves aggrieved by the decision, judgment and decree entered in this cause on the 5th day of February, 1934, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit for the reasons assigned in the Assignment of Errors filed herewith and said plaintiffs pray that their appeal be allowed, and that citation issue as provided by law, and that the Transcript of Record, proceedings and papers upon which said decree was based duly authenticated, be sent to the United Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California, under the rules of such Court in such cases made and provided.

And *you* petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

Dated this 5th day of April, 1934.

E. C. MULRONEY &
S. P. WILSON,

Attorneys for Plaintiffs.

Service of the foregoing petition for allowance of appeal is hereby admitted and a copy of the same

received at Missoula, Montana, this 3rd day of May, 1934.

W. L. MURPHY,
A. N. WHITLOCK,
Attorneys for Defendant. [92]

State of Montana,
County of Missoula.—ss.

Jackson C. Sain, being duly sworn upon oath says:

That he is one of the petitioners foregoing named and he makes this verification for and on behalf of all the petitioners; that he has heard read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge, information and belief.

JACKSON C. SAIN

Subscribed and sworn to before me this 2nd day of May, 1934.

[Seal]

EDWARD C. MULRONEY

Notary Public for the State of Montana,
residing at Missoula, Montana.

My Commission expires: June 15, 1935.

[Endorsed]: Filed May 3, 1934. [93]

Thereafter on May 3, 1934, Order Allówing Appeal was duly entered herein in the words and figures following, to wit: [94]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL. [95]

Upon reading and considering the petition for appeal on file herein together with the Assignment of Errors on file herein :

IT IS HEREBY ORDERED that the appeal of Jacksen C. Sain and the other plaintiffs to the United States Circuit of Appeals for the Ninth Circuit be, and the same is hereby allowed, upon the filing of a good and sufficient bond in the sum of \$300.00 to be approved by the Court.

Dated this 3rd day of May, 1934.

BOURQUIN,
Judge.

Service of the foregoing order allowing appeal is hereby admitted and a copy of the same received at Missoula, Montana, this 3rd day of May, 1934.

W. L. MURPHY
A. N. WHITLOCK

Attorneys for Defendant.

[Endorsed]: Filed May 3, 1934. [96]

Thereafter, on May 3, 1934, Prayer for Reversal was duly filed herein in the words and figures following, to wit: [97]

[Title of Court and Cause.]

PRAYER FOR REVERSAL. [98]

Come now the plaintiffs in the above-entitled action and pray that the decision, judgment and decree entered herein in the District Court of the United States in and for the District of Montana on the 5th day of February, 1934, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further orders as may be fit and proper in the premises be made in the above-entitled cause by said Circuit Court of Appeals.

Dated this 5th day of April, 1934.

E. C. MULRONEY &
S. P. WILSON

Attorneys for Plaintiffs.

Service of the foregoing prayer for reversal is hereby admitted and a copy of the same received at Missoula, Montana, this 3rd day of May, 1934.

W. L. MURPHY
A. N. WHITLOCK

Attorneys for Defendant.

[Endorsed]: Filed May 3, 1934. [99]

Thereafter, on May 3, 1934, Assignment of Errors was duly filed herein in the words and figures, following, to wit: [100]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS. [101]

Come now the plaintiffs in the above-entitled cause and file the following Assignment of Errors upon which they rely in the prosecution of their appeal from the decision, judgment and decree in said suit made and entered by the above-entitled Court on the 5th day of February, 1934.

I.

The Court erred in dismissing plaintiffs' Bill of Complaint.

II.

The Court erred in finding and holding that the Court is without jurisdiction in the cause.

III.

The Court erred in finding and holding that the State Court and not the United States Court has jurisdiction to hear and determine the matters at issue as shown by the pleadings in the cause.

IV.

The Court erred in finding and holding that to entertain this suit and decide the same in accordance with justice and the rights of the parties would constitute an invasion of the jurisdiction of the State Court.

V.

The Court erred in finding and holding that plaintiffs may not have an injunction and restraining order in this cause as prayed for in the complaint in this cause.

VI.

The Court erred in finding and deciding against the plaintiffs in this action and in favor of the defendant.

VII.

The Court erred in granting to the plaintiffs the injunction and relief prayed for in the complaint.

VIII.

The Court erred in not finding each of the proposed [102] findings of fact that were requested by the plaintiffs, to be true, the same being numbered Findings of Fact requested by plaintiffs numbered 1 to 19, inclusive, and the Court erred in failing to find and decide that each and all of said proposed Findings of Facts are true.

IX.

The Court erred in not finding and deciding that defendant herein has the legal right to divert from Rattlesnake Creek at the place designated on the maps introduced in evidence in this cause as "Dam" to the extent that it has need therefor, the water awarded and adjudicated to its predecessors in the decree in Cause No. 1953 by rights Nos. 3, 8 and 14 of the Findings of Fact in said decree and within the limits and according to the priorities prescribed in said decree, for the purpose of supplying the city of Missoula and its inhabitants with

water, but defendant does not have the right to divert at said place designated on said maps as "Dam" water to satisfy any of the other decreed rights included or adjudicated by the decree in Cause No. 1953 to its predecessors, whenever plaintiffs have need for such water.

X.

The Court erred in not finding and deciding that the attempt by defendant and its predecessors in interest to change the place of diversion of Right No. 1 in the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam", and likewise the attempt of defendant and its predecessors in interest, to change the place of diversion of Right No. 2, in the Findings of Fact of the decree in Cause No. 1953, from the head of original Higgins ditch to the "Dam"; and likewise the attempt of defendant and its predecessors in interest to change the place of appropriation of Right No. 9 in the Findings of Fact of the decree in Cause No. 1953 from the [103] head of original Higgins ditch to the "Dam" are, and each of said attempts is, injurious to plaintiffs, and said attempts cause, and each said attempts causes, damage and prejudice to plaintiffs and all of plaintiffs.

XI.

The Court erred in not finding and deciding that plaintiffs are entitled to an injunction restraining defendant from making the changes in place of diversion of the water rights described in the complaint in this action and referred to in these findings, or making either or any of such changes, when-

ever plaintiffs or any of plaintiffs shall be unable to obtain water at his or their point of diversion on account of defendant's diversion, said plaintiff or plaintiffs then having need for such water. Particularly plaintiffs shall be entitled to enjoin and restrain defendant from changing the point of diversion of right No. 1 of the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam", and shall be entitled to enjoin and restrain defendant from changing the point of diversion of right No. 2 of the Findings of Fact of the decree in Cause No. 1953 from the head of the original Higgins ditch to the "Dam", and shall be entitled to enjoin and restrain defendant from changing the point of diversion of Right No. 9 of the Findings of Fact of the decree in Cause No. 1953 from the head of original Higgins ditch to the "Dam", at any time whenever plaintiffs or any of plaintiffs have need for the water to satisfy their own appropriations and are unable to obtain the water to satisfy their own appropriations because of defendant's diversion thereof.

XII.

The court erred in not finding and deciding the claim of defendant to have the right to change the point of diversion of the water awarded and decreed to its predecessors in interest [104] in Findings 1, 2 and 9, from the head of the Mill ditch and original Higgins ditch to the "Dam", is wrongful and without authority of law and is invalid, being injurious to plaintiffs, and defendant shall not have the right to make change of the point of diver-

sion of said water rights, nor any thereof, whenever plaintiffs, or any of plaintiffs, have need for such water and are deprived of the water on account of any diversion of water by defendant.

XIII.

The Court erred in not finding and deciding that the plaintiffs were not guilty of laches, either in the commencement of their suit, or in the prosecution thereof, and that the plaintiffs' right of action set forth in the pleadings herein against the defendant is not barred by laches.

XIV.

The Court erred in not finding and deciding that the plaintiffs' action was instituted in good time and is not barred by the statute of limitations.

XV.

The Court erred in not finding and deciding the issues herein in favor of plaintiffs and against defendant.

WHEREFORE, plaintiffs pray that the decree herein be reversed.

E. C. MULRONEY &
S. P. WILSON,

Attorneys for Plaintiffs.

Service of the within Assignment of Errors is hereby admitted and a copy thereof received at Missoula, Montana, this 3rd day of May, 1934.

W. L. MURPHY,
A. N. WHITLOCK,

Attorneys for Defendant.

Thereafter, on May 3, 1913, Bond on Appeal was duly filed herein in the words and figures following, to wit: [106]

[Title of Court and Cause.]

BOND ON APPEAL. [108]

KNOW ALL MEN BY THESE PRESENTS:

That we, Jacksen C. Sain, in his own behalf and on behalf of all the plaintiffs above named, as principal, and St. Paul Mercury Indemnity Company, a corporation, organized and existing under and by virtue of the laws of Minnesota and qualified and authorized to do business in Montana, to execute bonds and undertakings and to act as security generally, within the District and State of Montana, are held and firmly bound unto Montana Power Company, a corporation, the defendant above named in the full sum of Three Hundred Dollars, to be paid to the said defendant, its successors or assigns to which payment well and truly to be made, said principal and said surety bind themselves, their, and each of their, successors and assigns, jointly and severally, firmly by these presents.

Sealed and dated this 3rd day of May, 1934.

WHEREAS, in the District Court of the United States for the District of Montana in the above-entitled suit pending in said Court between the above named plaintiffs and the above named defendant, a decision, judgment and decree was rendered against the said plaintiffs upon the 5th day of February, 1934, which judgment was entered on the 5th day of February, 1934, and said plaintiffs have petitioned for an appeal from said decision,

judgment and decree to the Circuit Court of Appeals of the United States for the Ninth Circuit and said plaintiffs propose to prosecute said appeal to reverse the said decision, judgment and decree and answer all costs if they fail to make their plea good.

NOW, THEREFORE, in consideration of said appeal, the condition of this obligation is such that if the plaintiffs shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall [109] be void, otherwise to remain in full force and effect.

JACKSON C. SAIN

[Seal] ST. PAUL MERCURY INDEMNITY
COMPANY

By S. P. Wilson, Agent.

The foregoing bond approved this 3rd day of May, 1934.

BOURQUIN,
Judge.

[Endorsed]: Filed May 3, 1934. [110]

Thereafter, on May 3rd, 1934, Citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [111]

[Title of Court and Cause.]

CITATION. [112]

United States of America to Montana Power Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Ap-

peals for the Ninth Circuit to be held at the City of San Francisco, California, within thirty days of the date hereof pursuant to an order filed and entered in the office of the Clerk of the District Court of the United States for the District of Montana, allowing an appeal from a decision, judgment and decree filed and entered in said Court on the 5th day of February, 1934, in favor of the defendant and against the plaintiffs in the above-entitled action being In Equity Number 1488, wherein you are the defendant and the above named plaintiffs are the plaintiffs, to show cause, if any there be, why the decision, judgment and decree rendered against the said plaintiffs, as in said appeal mentioned, should not be reversed and corrected and why justice should not be done the parties in that behalf.

WITNESS the Honorable George M. Bourquin, Judge of the United States District Court for the District of Montana, the 3rd day of May, 1934.

BOURQUIN,
Judge.

Service of the foregoing citation admitted and a copy thereof received at Missoula, Montana this 3rd day of May, 1934.

W. L. MURPHY,
A. N. WHITLOCK,
Attorney for Defendant.

[Endorsed]: Filed May 3, 1934. [113]

Thereafter, on May 3rd, 1934, Statement of the Evidence was duly approved and filed herein, which is Vol. 2 of this transcript and consists of pages 116 to 296 inclusive. [115]

[Title of Court and Cause.]

PLAINTIFFS' PROPOSED STATEMENT
OF EVIDENCE. [116]

BE IT REMEMBERED: That the above entitled action came regularly on for trial in said court at Missoula, Montana on Wednesday, the 25th day of October, 1933, before the Honorable George M. Bourquin, sitting without a jury upon the pleadings theretofore filed in said action. The Plaintiffs were represented by E. C. Mulroney, Esq., of Missoula and S. P. Wilson, Esq., of Deer Lodge; the defendant was represented by Messrs. Murphy & Whitlock and John E. Corette, Jr., Esq. and Walter L. Pope, Esq., all of Missoula. Thereupon the following proceedings were had and taken and the following evidence and none other was introduced:

PLAINTIFFS' CASE IN CHIEF.

PLAINTIFFS' TESTIMONY.

WILL CAVE

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Will Cave. My residence is at Missoula, Montana, where I have lived for 60 years. I know Higgins Ditch out of Rattlesnake Creek and Mill Ditch. I first became acquainted with the

(Testimony of Will Cave.)

lower portion of the Higgins Ditch in 1873, and the upper portion where it takes water out of Rattlesnake Creek some two or three years later, I cannot remember the exact time, but I do remember, as a boy, fishing along the creek by the head of this ditch. A few days ago in preparation for the trial of this case I pointed out to William Swearingen, plaintiffs' engineer, the head of the original Higgins Ditch and also the head of the Mill Ditch. [117]

CROSS EXAMINATION by Mr. Pope:

I am familiar with the location of the Fedderson (now Klapwyck) barn, the head of the old Higgins Ditch is about a quarter of a mile down stream from this barn and about 200 yards north of the south line of section 10, which I think was the Fedderson land. The head of the Mill Ditch was right under the Northern Pacific trestle crossing the Rattlesnake. A little over a quarter of a mile above the head of the Higgins Ditch, Rattlesnake creek divides into two channels, the forking of the stream to make two channels, being a little north, up stream, of the Fedderson or Klapwyck barn.

W. H. SWEARINGEN,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is W. H. Swearingen, and my residence, Missoula, Montana. My occupation, Civil

(Testimony of W. H. Swearingen.)

Engineer, which occupation I have been engaged in practically all my life. I am now city engineer of Missoula. I made a map in the past few days showing various ditches out of Rattlesnake Creek; Rattlesnake is located northerly from the City of Missoula, and in Missoula County. It is a tributary of the Hellgate or Missoula River or Clark's Fork, emptying into the Missoula River within the Dan Paul Addition to Missoula about 300 feet west of the Van Buren Street bridge. The map shows the Rattlesnake Creek to its mouth, also the Mill and original Higgins ditches; the points of diversion of these ditches were pointed out to me by Will Cave to enable me to prepare the map. The map also shows the Hamilton-Grant-Day [118] ditch, which is on the west side, as are the Higgins and Mill ditches, and on the east side there is the Tucker, Williams, Cobban, Fedderson and Neill ditches, all of which are named on the map. The map also shows the lands of the various plaintiffs, which lands are generally indicated by the name of the owner, and a color so far as possible for each separate holding. My information for the separate holdings of each of the plaintiffs was taken from the complaint. The holdings of the smaller owners among plaintiffs are not entirely accurately shown on the map, because such holdings in some instances are so small that the same cannot well be shown on so small a scale.

(Testimony of W. H. Swearingen.)

The head of the Mill ditch is approximately 1000 or 1500 feet north (above) the mouth of the creek; the original Higgins ditch is located directly opposite the valve house on the Montana Power Company pipeline, and it is in section 11, north of the south line of 11 about an eighth of a mile. The "dam" is approximately four miles (up stream) from the head of the Mill ditch. The "dam" that I speak of has to do with the defendant's diversion of water; the "dam" collects all the water in the creek and defendants can let as much go over the dam and down the creek as it wants to, but defendant is able to divert the entire flow from the creek into its pipeline, which runs into its reservoir, from which water is taken for distribution to the City of Missoula. The Fredline ditch heads out of Rattlesnake creek about a mile above the head of Mill ditch and below the head of Higgins ditch.

The map substantially correctly shows these things, and the approximate location of those ditches.

Whereupon, without objection, the map is offered and [119] admitted in evidence as plaintiffs' Exhibit 1.

CROSS EXAMINATION by Mr. Whitlock:

The location of the Higgins and Mill ditches was obtained from someone else, not from my own knowledge, and the location of the other ditches, designated by name, was made by me from actual observation on the ground, merely approximately.

(Testimony of W. H. Swearingen.)

By defendant's point of diversion, I mean the "dam". It extends entirely across the creek, so that the whole creek can be diverted, though it has gates permitting the water to flow through it. The "dam" is approximately 100 feet higher in elevation than the head of the Mill ditch. The head of the Mill ditch is approximately on a level with the lower part of the City of Missoula, and the head of the Higgins ditch is at a lower level than the "dam".

REDIRECT EXAMINATION by Mr. Wilson:

My location, with the help of Mr. Cave, of the heads of the Higgins ditch and Mill ditch, as well as the ditches on the east side of the creek was made by me by personal observation on the ground.

EDWARD RAY,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Edward Ray; I live up Rattlesnake about 5 miles and am a dairy man. I have lived there 12 years, and my home is on the old Effinger place. I have water rights, 100 inches of Spring Gulch of 1882 and 100 inches of Rattlesnake of 1889, which latter right is No. 17 in Rattlesnake decree. I have not yet received a deed for my land, because I have not yet fully paid the purchase price, but I

(Testimony of Edward Ray.)

hold a contract of [120] purchase for it, legal title still standing in the name of Charlie Effinger. I have participated in the making of observations and measurements in the last few years along Rattlesnake creek. In 1926 we had a weir in the creek, where the Mill ditch takes out.

Q. How wide was the weir that the water flowed over?

A. Well, I believe it was six feet.

Q. Now, how much water, do you recall, was flowing over the weir?

Mr. WHITLOCK: That is objected to, if your Honor please, as not material to this case, relating to a measurement long subsequent to the alleged time of the change of diversion; and besides, it is objected to for the reason that this man is not the man who made the measurement.

The COURT: Overruled.

Mr. WHITLOCK: Note an exception.

On August 12th, in company with Elmer Hughes, who is an engineer, we made a measurement at the head of the Mill ditch and there was then a depth of four and a quarter inches of water flowing over the weir. Elmer Hughes became afflicted with heart disease and had to go southwest, so he is not here. After we made this measurement we went immediately up stream to see the condition of the stream above, and at the lane between Rutledge Parker and Klapwyck's, which is about 100 feet below the head of the Hollenbeck ditch, there was no water in the creek. We made another observa-

(Testimony of Edward Ray.)

tion later in August and there was less water flowing over the weir at the head of the Mill ditch than there was on August 12th, but the stream was dry 100 feet below the head of the Hollenbeck ditch, where we made an obser- [121] vation. The water at the weir came up probably from the dam.

During the time these observations were being made, the ditch on the east side of the creek, coming out by Van Buren Street, which I think is named Fredline ditch, was always running full, and the size of the stream can be determined, because it went through some round pipes, which I did not measure.

Q. Now, Mr. Ray, since you have been up there have you—just tell us the condition of the stream bed below the dam during the summer months, say in the month of August, as to water raising, if you have ever observed, in the channel. Just describe what—how it comes.

Mr. WHITLOCK: That is objected to as relating to a time not material to the time of the alleged change in diversion, this witness saying he has recollection or knowledge no further back than 12 years.

The COURT: Overruled.

Mr. WHITLOCK: Exception.

Water arises in the bed of the stream below the head of the Hollenbeck ditch. It starts to raise up in the bed of the stream where the county bridge crosses, which is about two or three hundred feet below the head of the Hollenbeck ditch. The water

(Testimony of Edward Ray.)

comes up in the creek bottom, because there are no tributaries, ditches or pipes coming in from the sides that I have seen, and I have observed it there a good many times. My residence and irrigated land is located on Rattlesnake creek above the dam of Montana Power Company. 1921 was the first year I irrigated, and I have irrigated every year since 1921. In 1921, 1922 and 1923, I always had the water decreed for my land and used that amount of water all summer each of those years. In latter August, 1924, defendant's pre- [122] decessor shut off my water for a part of the irrigation season, and we had controversies about the use of the water. The same thing was done in 1925 somewhat earlier in the season, and this was repeated in 1926 as early as July. There was trouble between me and the water company representative as to the use of the water, and other irrigators had trouble with the water company's representative. From August 1924 until the commencement of this action the water company has been increasing its use of the water and shutting down my water earlier each year. I was only shut off about 10 days in 1933. My land requires irrigation.

CROSS EXAMINATION by Mr. Whitlock:

I live above the dam of the Montana Power Company.

When I first began my residence on Rattlesnake creek Montana Power Company dam was there just like it is now in the same location, and defendant's

(Testimony of Edward Ray.)

predecessor was diverting the water there for Missoula City and its inhabitants, of which I had knowledge. I claim 100 inches of right No. 17. Concerning the measurements testified to by me, the first one was about July 25, 1926. After measuring at the weir at the head of the Mill ditch, I drove up the road to Day Bridge on Parker Lane, crossing the Rattlesnake, which is a mile and a half below the dam. I saw engineer Hughes measure the height of the water on the weir and it was around five inches in depth. Our next measurement was August 12, 1926 at the weir at the head of Mill ditch, and the water flowing over the weir was then four and a quarter inches, and after making that measurement we again went up the stream to the bridge on Parker Lane and the stream "bed" was there dry. Our third measurement was in the latter part of August, 1926, near the 29th. The depth of water then flowing over the weir was [123] around four inches. The water was a little lower at each of these measurements. We then again went up the stream to where Parker's Lane (Day bridge) crosses, and observed that the stream was dry at that point. The place up stream where we observed there was no water, where Parker Lane crosses (Day bridge) is about 100 feet below where Hollenbeck ditch comes out and a mile and a half downstream from the defendant's dam. Our measurements each day were made between 10 and 11 o'clock A. M. Fredline ditch, each of these days, was flowing full of water and getting the benefit of the water

(Testimony of Edward Ray.)

in the stream at its head. There are no streams coming into Rattlesnake creek anywhere below the dam to the mouth of Rattlesnake.

After I came to live on Rattlesnake, from 1926 on, each year, there was a water commissioner, and each year the condition as to my water, became a little worse.

It was agreed in open court between respective counsel that the Effinger land and water right No. 17 referred to in decree of Rattlesnake creek passed by mesne conveyances to the witness Edward Ray, and that he now holds same by virtue of his contract of purchase.

JACKSON C. SAIN,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is J. C. Sain. I live on Rattlesnake where I have lived for 30 years. My occupation, florist. I am one of the plaintiffs and have 50 acres of land. I have 18th right on Rattlesnake creek for 50 inches and 36 inches of right No. 21. The 18th right was decreed to William Neill, [124] and his land and water right were acquired by me by purchase and I hold legal title to that by deed. I receive the 18th right water through the Neill ditch and the 21st right water through the Cobban-Ray-

(Testimony of Jackson C. Sain.)

mond ditch. I have made measurements of water on Rattlesnake creek during the past few years. About a half dozen of us water users on Rattlesnake made a measurement in July, 1926. Mr. Miller and Mr. Tucker's hired man were there; I cannot recall the others. Our measurement was made at the same weir in the stream at the head of Mill ditch, described by Mr. Ray. It was a 10 foot weir rather than a 6 foot weir. The water was closely dammed up so as to flow all over the weir.

Q. All right. Now, just tell us the flow of water that you observed on the day that you observed it?

Mr. WHITLOCK: That is objected to as not material to the case.

The COURT: Overruled.

Mr. WHITLOCK: Exception.

There was a peg flush with the top of the weir and there was four and a half or five inches depth of water flowing over the weir. After making this measurement, we went up stream to the head of the Hollenbeck ditch, which was taking water out. There was no water in the stream bed below the Hollenbeck ditch. We observed the stream below the head of Hollenbeck ditch and down to where this weir is located; the stream was dry below the head of Hollenbeck ditch and as you come down the water picks up in the bed of the creek. Sometimes there is a little trickling through between the banks, seeps in as we call it, but there are no tributaries coming into Rattlesnake at all, nor other sources of water

(Testimony of Jackson C. Sain.)

flow contributing water in substantial amounts to the stream, except [125] seepage from the bed of the stream, as we call it, between the head of Hollenbeck ditch and the weir; the only other water going out of the bed of the creek was the Fredline ditch. This was probably 150 inches, although we didn't measure it. There is a place on Fredline ditch, where it crosses Vine street, where the water is confined in a pipe or tube, and since then I have measured that tube and it is 18 inches in diameter and 14 inches long, laid with a good slant or grade. The ditch was not flowing full at the time of our measurement at the weir. We did estimate the flow in miners inches in the Fredline ditch at that time.

At the time of our measurement the water flowing through the weir at the head of Mill ditch was flowing into the Missoula River, and the water flowing into the Fredline ditch was going to the Highes gardens. At times being a little younger ditch, I was a little short sometimes, probably sometimes in the latter part of July I would be shut off for awhile but as a rule I got water right along.

During the first ten or fifteen years that I lived on Rattlesnake, we generally had water most every year until about 8 or 9 years ago, and then the water situation began to get a little worse. Montana Power was taking more water. My land is arid and requires irrigation.

CROSS EXAMINATION by Mr. Whitlock:

My land is located about a mile down stream from the defendant's dam. I was not a party to Rattle-

(Testimony of Jackson C. Sain.)

snake water suit, but defendant's dam was located in its present location when I began my occupancy of my land there, and water for Missoula city was then being diverted there, which facts I knew when I acquired my property. The head of the Neill ditch is approximately half a mile down stream from defendant's dam.

I participated in three water measurements in 1926, the exact days I do not remember, and part of these occasions [126] were the same as that Ed Ray testified about, one in July and one about the middle of August, and the measurement was at the weir at the head of Mill ditch. The depth of water flowing over the weir was from four and a half to five inches, and each measurement showed the flow slightly lower than the previous flow. We did not go to any point on the stream, except the point described below the Hollenbeck ditch, which is approximately a mile and a half down stream from the dam. The occasions mentioned were the only observations made at the stream, but we made observations at the Fredline ditch, and once there was water flowing in that. The water in the bed of the stream below the Hollenbeck ditch was seepage water. I say we had water until the last 8 or 9 years for our use in irrigation, but it was not plentiful. Some years we had all that was coming, and other years our ditches were shut down when it got dry, but for the first 10 or 15 years I lived up there, we got practically all our decreed water, but for the

(Testimony of Jackson C. Sain.)

last 8 or 9 years there have been times we were short of water. I know how much water Montana Power has taken some years. We measured in August, 1923 at the weir at the head of the dam and we made other measurements later. When I said that Montana Power has used more water in the last 8 or 9 years than it used prior to that time I was merely stating my assumption and belief.

REDIRECT EXAMINATION by Mr. Wilson:

The year I began my residence on Rattlesnake creek was about 1907. The water flowing in the Fredline ditch at the time of our measurement in August, 1926 was seepage water taken out of the bed of Rattlesnake creek. The measurement of stream flow made in August, 1933 at the head of defendant's dam was 1100 [127] inches.

RUSSELL MILLER,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Russell Miller. I live on Rattlesnake creek and have lived there since March 1, 1915. I have 10 acres of land. I have portions of water rights 10 and 16 of Rattlesnake decree, and a portion of right 20 between me and my sister, all through Hollenbeck ditch; my land requires irriga-

(Testimony of Russell Miller.)

tion. I participated in the making of a measurement of water flow of Rattlesnake creek and I made a memorandum of it at the time, and the measurement was upon July 15, 1926. There was a body of men on that day finishing a dam and placing a weir on the creek at the head of Mill ditch. These men seemingly had worked the previous day, but I came the second day. These men were J. C. Sain, L. E. Tucker, my father, L. F. Miller, Mr. Ray's hired man, and Mr. Tucker's hired man. The weir installed was 10 feet wide.

Q. All right then. Just tell us the condition of the flow of water at the point.

A. Well, the flow of water was——

Mr. POPE: We object to that upon the ground that it relates to a period not in issue in this case.

The COURT: Overruled.

Mr. POPE: Exception.

There was a depth of four and a half inches of water flowing over the weir, which is a 10 foot weir. After making this measurement, and later in the afternoon, I went up the Fredline ditch, which is one of the lower ditches, where it [128] crosses Van Buren street. It was running practically full; I estimated 100 inches, but did not measure; and when I got home, I went over to the Hollenbeck ditch around supper time and below Hollenbeck ditch there was nothing but pools, no flowing water, and I could see perhaps 20 rods down stream below the head of Hollenbeck ditch and there was nothing

(Testimony of Russell Miller.)

but potholes with water in them. The Hollenbeck dam is constructed to take all the water in the stream at that point into the ditch. When the stream is dry just below the head of Hollenbeck ditch, the amount of water in the stream bed gradually increases, so that there is always a flow before you get down to the head of the Fredline ditch. I have never seen the Fredline ditch dry; I passed over it daily for years and never remember seeing it dry; it is usually a full stream. The Fredline ditch heads away down below the head of the original Higgins ditch.

CROSS EXAMINATION by Mr. Pope:

I acquired my land about 1921 in a trade with my father. I had lived on Rattlesnake from 1915 until then, and I went constantly to my father's place. I paid no attention to the water used by the water company during my first acquaintance with Rattlesnake valley, because we just came from the east where rain fall is plentiful and water rights mean nothing, but prior to 1921, I had observed that the water company used its dam to divert water to supply Missoula.

The time of our measurement of water at the weir at the head of Mill ditch was 3:50 P. M., July 15, 1926. I helped finish the weir on that day, but the others had worked on it the previous day. That is the only measurement in which I participated. [129]

WINANS—Foillow Dick—number three

(Testimony of Russell Miller.)

DEDIRECT EXAMINATION by Mr. Wilson:

I have said that I passed the Fredline ditch practically every day and observed water flowing in the Fredline ditch, and I crossed Rattlesnake creek at the Greenough place which is just a little above where the weir measurements were made at the head of the Mill ditch, and I can never remember seeing the creek dry at that place. My judgment is that the water has always flowed there, and the water flowing there goes to the mouth of Rattlesnake creek into Hellgate river.

RECROSS EXAMINATION by Mr. Pope:

After making the weir measurement on July 15, 1926, I went to the head of the Hollenbeck ditch after supper, and in the evening sometime, it might have been right after I got home, or it might have been 8:00 or 9:00 o'clock, I don't remember the specific hour, I went to the head of the Hollenbeck ditch to ascertain whether the water flowing where we measured was seepage or whether it wasn't, and that depended on whether it was dry above or not. The water flowing in the Hollenbeck ditch at that time was a usual condition. I estimated it 40 inches, which was seepage water that had accumulated very close to the head of the Hollenbeck ditch.

I. Q. ROBERTS,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is I. Q. Roberts. I live up Rattlesnake. My occupation is farmer. I have lived up Rattlesnake 31 years and have used decreed water, 15 inches out of Cobban-Raymond ditch and three inches out of Williams ditch. I occupy and [130] work five acres, which require irrigation. I have irrigated and grown crops during the 31 years I have lived up there. I participated in making a measurement on one occasion at the weir at the head of the Mill ditch. I had a record of it, but I misplaced it or lost it; but one measurement was between four and five inches, by that I mean there was four and a quarter or maybe four and a half inches depth of water flowing over the weir. I do not recall the width of the weir. I did not go up the stream to make observations of the stream flow above, only what I could see coming down over the railroad trestle, in the creek.

My land requires irrigation, and after the first year, I have got water through the Williams ditch during the 31 years I have resided there. The right was decreed, but the ditch was not established the first year. Since then I have been able to get my water through the Williams ditch, which has been shut off only for short periods, about half a day from time to time. The Williams ditch taps Rattlesnake above the defendant's dam.

(Testimony of I. Q. Roberts.)

I remember the original Higgins ditch about the time the Rattlesnake decree was entered. It used to cross Spruce street here in Missoula and flow west of town, and during my first years on my place on Rattlesnake, I peddled vegetables and fruit into town, and I saw the water flowing down the Higgins ditch through town every day. This was the second or third year I was up there, and I have been up there 31 years; it must have been about 1904, that is when I observed the water in the ditch across the road, and I recall seeing the water in the summer of 1904, but I do not recall when the water ceased to flow in the Higgins ditch. [131]

CROSS EXAMINATION by Mr. Whitlock:

I was not a party to the Rattlesnake water suit. My rights were acquired since then from others. I do not remember the year the measurement was made that I saw. I think Mr. Sain was present when it was made, and probably Mr. Tucker. I have had water through the Williams ditch practically all the time, but a shortage in the Cobban ditch sometimes. I do not remember the years, but during dry years; during the first few years I was up there, the ditch was never shut off. The shortage must have begun 10 years ago.

JACK RAY,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Jack Ray; I am employed by a banking institution, but do engineering as a side line. I have made observations of the stream flow from time to time in Rattlesnake creek. On August 7, 1924 I measured at the present intake of Montana Power Company pipeline.

Q. And what did you measure at that time?

Mr. POPE: That is objected to as relating to a period not in issue in this case.

The COURT: What is the object?

Mr. WILSON: Well the object is to show the condition of the stream, the size of the stream and the amount of water flowing.

The COURT: Well, how will this contribute to it?

Mr. WILSON: Well, upon this theory, that it is important, I suppose, to know how large a stream [132] this is, the extent and the flow of the stream. Now, what it was at the time he made his measurements and what it is now and what it will be—

The COURT: Well, is this pipeline intake out of the dam?

A. Yes, sir.

The COURT: Well, I can't see where that will show you anything about the stream. However, he may answer.

(Testimony of Jack Ray.)

Mr. POPE: Exception.

The total flow of the creek on August 7, 1924 was 1642.32 miners inches. Measurement was made at four different places, all above the dam; and the figure I have given is the entire flow of Rattlesnake creek at that time.

CROSS EXAMINATION by Mr. Pope:

At the time of my measurement, I took a cross section of all the water that was constituting the total flow of the stream, the same being a flume, a ditch, and ditch and a pipe from the flume. My measurements were made within a quarter of a mile above the intake of the defendant's water system. I couldn't say whether or not there was storage water or water from a lake or lakes back in the mountains then flowing down the stream. I believe there are several lakes back in the mountains used for storage purposes, but I have knowledge of them only by hearsay.

REDIRECT EXAMINATION by Mr. Wilson:

When there is a depth of four and a half inches of water flow over a 10 foot weir, there is 304 miners inches in the flow; when the water depth is five inches over a 10 foot [133] weir, there is 368 miners inches.

RECROSS EXAMINATION by Mr. Pope:

My answer is based on an 0.0 velocity, and assuming that the water is at a standstill seven feet above the weir.

JOE McDONALD,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Joe McDonald, and I reside on Rattlesnake. I am a dairyman by occupation. I have lived there since February 1, 1931. Of water rights I have 45 inches of decree right No. 5, 40 inches of No. 10, 220½ inches of No. 20, and 56 inches of No. 21. I irrigate approximately 175 acres, all of which require irrigation. During the years I have lived on Rattlesnake, I have irrigated whenever water was available. Legal title to the land possessed by me is in the name of the Federal Land Bank of Spokane, and I have a contract of purchase.

On August third of this year, with Mr. Miller, Mr. Sain and Ed Ray, we observed the stream flow of Rattlesnake creek from the head of Hollenbeck ditch to the mouth, below the head of Hollenbeck ditch; the stream bed was practically dry, no water, only potholes in the bed of the creek. We observed that the Fredline ditch was running practically full. We did not measure water flowing at the head of the Mill ditch, only observed the flow going down the stream at that point. The weir that had been installed in 1926 being no longer there. There was then a substantial flow going down the creek past the head of the Mill ditch to the mouth of the creek. The water that was flowing down by the head [134] of the Mill ditch, and that was flowing into the Fredline ditch

(Testimony of Joe McDonald.)

was seepage arising in the creek bed, below the head of the Hollenbeck ditch. My observation was that this seepage begins to come back into the channel of Rattlesnake creek below what has been described here as the head of the Higgins ditch, and below what has been described as the Day bridge, is where it starts to seep. The Fredline ditch takes out above the Day bridge and below the point of diversion of the Higgins ditch; there it is running full. The Fredline ditch sometimes, not always, exhausts the stream at the point where it diverts from the stream, and then below, the water again comes up in the channel between that and the head of the Mill ditch.

The first year I was on the creek we had an abundance of water until July, when we were abruptly shut off, to our considerable damage, and the water was not turned on again until September, I believe. In 1932, the water was not shut down quite so early, and some of the water was never completely off. This year there has been water most of the time; No. 21 was shut down a little while.

Q. I will ask you this question for the purpose of the record: to state whether or not you have suffered damage and will suffer damage in the future by reason of the change of point of diversion by the defendant from the diversion at the head of the Mill ditch or the original Higgins ditch to a point at the dam which is described by the witnesses?

Mr. WHITLOCK: That is objected to as calling for an opinion which the witness is not competent to give, and not proper.

(Testimony of Joe McDonald.)

The COURT: I think so. The facts will show. Sustained.

CROSS EXAMINATION by Mr. Whitlock:

When I acquired my land about February 1, 1931, de- [135] fendant's dam in Rattlesnake was right where it is now, and I knew that the water company was taking water from Rattlesnake. I have been at the dam several times; it is a permanent structure, apparently having been there a long time. The only time I have participated in observations of the stream flow near the head of the Mill ditch, was August third of this year. Below Hollenbeck ditch, there was just some potholes of water. I referred to seepage as the water coming out from the side of the bed of the stream; there is no flow of water that runs into the stream. This water that I speak of at the head of the Fredline ditch can be seen coming from the side, seeping out of the bank and running into it as seepage water. That condition is along there for a quarter of a mile. Water is found in potholes in the bed of the stream right at the Hollenbeck headgate, and some more water lower down, also in the bed of the stream.

REDIRECT EXAMINATION by Mr. Wilson:

Q. I will ask you, Mr. McDonald, if you observed this condition, that the creek bed would be dry just below the dam and at the same time that the water would raise above the head of the Hollenbeck ditch to make a stream flow into the Hollenbeck ditch?

(Testimony of Joe McDonald.)

Mr. WHITLOCK: That is objected to, first, as leading——

The COURT: Yes, yes. Sustained.

Mr. WILSON: Well, May I ask the witness——

The COURT: Well, he is pretty well primed for it now.

The Court takes it into consideration.

Q. Above the Hollenbeck ditch there have you observed that was the condition of the stream?

Mr. WHITLOCK: That is objected to, no time being fixed [136] and the inquiry going to a time not material in the case.

The COURT: He may answer.

Mr. WHITLOCK: Exception.

The condition of seepage water below the dam is the same as below the head of Hollenbeck ditch; below the dam there is a pipe line that dumps some seepage water in and makes a little stream, and on down below the point where the Raymond-Cobban ditch is there will be a larger stream at a time when there is no water right directly below the dam, and the Cobban ditch is a quarter or maybe a half mile down the stream from the dam, and then gets more water below the Cobban ditch until it gets to the Hollenbeck ditch.

Rattlesnake valley is approximately a mile up stream from it. The mouth is very narrow, hardly any valley at all, then it opens until it is probably a mile and a half or two miles wide, sloping toward the creek, down stream, not a steep slope, just a valley.

(Testimony of Joe McDonald.)

RE CROSS EXAMINATION by Mr. Whitlock:

The pipeline I speak of comes into the stream just below the dam, and I have been told, is used by defendant, but I don't know of my own knowledge.

Thereupon, without objection, Exhibit 2 of the plaintiffs, a certified copy of the Rattlesnake Decree, Cause No. 1953, of the District Court of Missoula County, Montana, and Exhibit 4, the Registrar of Actions, in the same case, were offered and admitted as evidence. Exhibit 2 is identical with Exhibit A, made a part of the complaint heretofore copied at length in this transcript, except that the filing date as shown in Exhibit A attached to the complaint should be eliminated, and the same is therefore here [137] omitted.

(Testimony of Joe McDonald.)

EXHIBIT 4

is in words and figures as follows:

The Missoula Water Company,
a Corporation,

vs.

Charles E. Williams, Missoula County,
John E. Johnson, Elmer E. Hughes,
John White, Harry Mattison, and
others.

Injunction

Attorneys for Plaintiff:

Woody & Woody, Marshall & Stiff.

Attorneys for Defendants:

Gunn & Clayberg, W. P. Smith, Dixon &
Murphy.

Date	Proceedings	No.	Costs
August 13, 1901	Filed Complaint	1	\$ 5.00
" " "	Issued Summons handed T. C. M.		
" " "	Filed order for Injunction	2	
" " "	Filed Undertaking for Injunction and bond	3	
" " "	Issued Injunction, handed T.C.M.		
" 27, "	Filed Affidavit for Injunction against H. E. Day	4	
" " "	Filed Order for Injunction as to H. E. Day H. 132	5	
" " "	Issued Injunction handed Miss Nellie Fay		
" " "	Filed undertaking in Injunction as to H. E. Day (approved)	6	

(Testimony of Joe McDonald.)

Date	Proceedings	No.	Costs
Sept. 3, 1901	Filed Summons returned with service on the following: Elmer E. Hughes, Aug. 19th, Harry Mattison, Aug. 19th, Ollie D. Mattison, Aug. 19th, John Smith, Aug. 19th, B. F. Nesmith, Aug. 19th, Mary F. Nesmith, Aug. 19th, E. R. Kilburn, Aug. 19th, J. S. Kemp, Aug. 19th, Arthur Franklin, Aug. 19th, Thomas P. Street, Aug. 19th, R. M. Cobban, Aug. 19th, Peter Feddersohn, Aug. 19th, John E. Johnson, Aug. 20th, John White, Aug. 20th, Andrew Schilling, Aug. 20th, Delia Murray, Aug. 20th, Harvey Biggs, Aug. 20th, William Mattison, Aug. 20th, W. H. Raymond, Aug. 20th, J. W. Connelly, Aug. 20th, J. G. Ambrose, Aug. 20th, H. E. Day, Aug. 20th, William Neil, Aug. 20th, Mrs. E. J. Clements, Aug. 20th, C. H. Moss, Aug. 20th, L. W. Barrett, Aug. 20th, A. A. Settlamire, Aug. 20th, W. H. Hamilton, Aug. 20th, John Harkness, Aug. 20th, G. B. Frazier, Aug. 22nd, Charles E. Williams, Aug. 19th, W. P. Smith, Aug. 19, Theo LaChambre, Aug. 19, Sebastian Effinger, Aug. 19, Otto Quast, Aug. 20th, E. J. Wartman, Aug. 21st, F. L. Pelcher, Aug. 21, Cluff Vasser, 21, Joel A. Moss, Aug. 19, Geo. A. Duncan, Aug. 21, John Adams, Aug. 21, W. F. K. Beerkove, Aug. 21, C. E. Van Buren, Aug. 21, Chas. M. Owens, Aug. 26, John Capp, Aug. 28th.	7	

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(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
Sep.	24, 1901	Filed Demurrer	8	\$ 2.50
"	" "	Ordered that Defts attorneys show for whom they appear, and by what authority.		
Oct.	7, "	Demurrer set for hearing, Oct. 8, 1901		
"	8, "	Demurrer argued and submitted		
"	12, "	Genl Dem overruled, 2, 3, 8, Spl D. sustained, Pltf. granted 5 days to amend.		
"	17, "	Time for filing amend. complt extended 10 days from date.		
"	26, "	Filed amended complaint seal 10/17/33	9	.50
Nov.	14, "	Filed Demurrer to amended complt.	10	
"	25, "	Leave granted to withdraw de-demurrer filed Nov. 14 and to file amended demurrer.		
"	26, "	Order made Nov. 25th, 1901, vacated, General Demurrer allowed to stand.		
Dec.	13, "	Demurrer to amd. Compt set for hearing Saty. Dec. 14—10 A.M.		
"	14, "	Demurrer submitted without argument.		
"	16, "	Defendant withdraws motion, 25 days to answer.		
Jan.	10, 1902	Filed answer of H. C. Hollenbeck, Wallace P. Smith, Elmer E. Hughes, C. M. Owen, Anton Schilling, Mary F. Nesmith, Mamie E. Murray, Ollie D. Mattison, Amanda Mattison, Rufus Stryker, R. M. Cobban, J. G. Smith, A. E. Pound, Lucy Pound, H. C. Chattin, H. H. Hazelton, Adeline M.		

(Testimony of Joe McDonald.)

Date		Proceedings	No.	Costs
		Biggs, L. L. Wright, W. H. Raymont, Beadie Moss, C. H. Moss, F. M. Kilbourne, Thomas P. Street, A. B. Libby, W. A. Buswell, E. H. Sherman, G. B. Frazier, J. L. Johnson, John White and the County of Missoula	11	
Jan.	10, 1902	Filed separate answer of J. S. Kemp	12	
"	" "	Filed separate answer of William Neil	13	
"	" "	Filed separate answer Sebastian Effinger	14	
"	" "	Filed separate answer Peter Feddersohn	15	
"	" "	Filed separate answer of Otto Quast, C. E. Williams, Elmer E. Hughes, Ollie D. Mattison, Mary F. Nesmith, Jeanette Stilth, John White and John D. Johnson	16	
"	" "	Filed separate answer of W. R. Hamilton and H. E. Day	17	
"	" "	Filed separate answer of Charles E. Williams and Jennie Williams, Otto Quast and Jacob G. Ambrose seal 10/17/33	18	.50
"	" "	Filed separate answer of Missoula Lodge, No. 13, A. F. and A. M.	19	
"	" "	Filed separate answer of Theodore LaChambre	20	
"	" "	Filed separate answer of R. M. Cobban, W. H. Raymond, Charles E. Williams, William Neil, Jacob G. Ambrose, H. C. Chattin, John Barrett, E. J. Clements and John Capp	21	
Feb.	3, "	Stipulation to be filed		

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
Feb.	4, 1902	Trial set for March 26th, 1902, at 10 A M		
Mar.	12, "	Filed stipulation to issue com- mission to take testimony	22	
"	" "	Filed Order to issue Commis- sion to take testimony	23	
"	" "	Issued Commission to take tes- timony of W. B. S. Higgins, handed Judge Woody	24	
"	14, "	Filed stipulation to issue commission to take testimony	25	
"	" "	Filed Order to issue Commis- sion to take testimony of Phil Shenon	26	
				[140]
Mar.	14, 1902	Issued Commission to take tes- timony of Phil Shenon, handed Judge Woody	27	
"	21, "	Filed deposition of Phil Shenon		
"	22, "	Filed deposition of W. B. S. Higgins	28	
"	24, "	Filed separate answer of Missoula Real Estate Assn.	29	
"	31, "	Filed amendment to plaintiff's amended Complaint	30	
"	" "	Filed petition in intervention of Philimine Fredline, admx.	31	
"	26, "	By agreement of counsel cause set for trial Monday, March 31st.		
"	31, "	Trial commenced.		
April	1, "	" continued		
"	2, "	" "		
"	" "	Filed affidavit of attendance of Wm. T. Hamilton	32	
"	" "	Filed affidavit of attendance of F. A. Hammond	33	
"	3, "	Received fee for Intervenor		\$ 5.00
"	" "	Receiver Stenographer fee for Intervenor		3.00

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
April	3, 1902	Received Stenographer fee for Plaintiff		3.00
"	" "	Received fee Answer Missoula Real Estate Assn.		2.50
"	" "	Received fee for Gen. Separate Answers		25.00
"	4, "	Trial continued		
"	5, "	" "		
"	" "	Filed Subpoena	34	
"	8, "	" "	35	
"	8, "	Trial continues		
"	9, "	Filed subpoena of Winbu	36	
"	9, "	Trial continued		
				[141]
April	10, 1902	Trial Continued		
"	12, "	Trial continued to Wednesday, April 16th		
"	16, "	Trial resumed		
"	16, "	Received stenographers fees for 11 separate answers (3rd)		33.00
"	" "	Received stenographers fees for Missoula Real Estate Assn.		3.00
"	" "	Default, attached to back of amended complaint, entered for want of an answer of Harry Mattison, B. T. Nesmith, E. R. Kilburn, Harvey Biggs, J. W. Connelly, Wm. Mattison, A. A. Settlimier, John Harkness, Joel Moss, John Adams, C. E. Van Buren, E. J. Waitman, T. L. Pelcher and Cluff Vassar.		
"	18, "	Filed Reply to Separate answer of Feddersohn	37	
"	18, "	Filed Affidavit to Thos. C. Marshall	38	
"	19, "	Trial Continued to Monday April 21.		
"	21, "	Issued and filed Subpoena of H. C. Hollenbeck	39	

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
Jan.	10, 1902	Issued Subpoena on Al Higgins	40	
"	" "	, " " " Peter		
		Feddersohn	41	
"	22, "	Filed notice of motion to file		
		complaint in intervention	42	
"	" "	Filed complaint in intervention		
		of Alvina Pelkey, et al.	43	5.00
"	" "	Stenographer Fee of Alvina		
		Pelkey et al.		3.00
"	21, "	Trial resumed		
"	21, "	Filed separate answer of George		
		Duncan	44	2.50
"	" "	Filed " " "		
		A. E. Franklin	45	2.50
"	" "	Filed " " "		
		Lucretia Worden et al.	46	
				[142]
April	21, 1902	Stenographer Fee Franklin \$3.00		
		and Duncan 3.00		6.00
"	" "	Further hearing on this cause		
		continued to May 6th, 1902		
May	6, "	Cause resumed and continued to		
		June 2nd, 1902		
June	2, "	Cause resumed and adjourned to		
		June 30th, 1902		
Sept.	4, 1902	Arguments made by plaintiffs		
		and defts. Attorneys		
July	18, 1903	Filed Notice of Motion for New		
		Trial	47	
"	25, 1903	Filed Exceptions	48	
Oct.	31, 1903	By consent plaintiff and defendants		
		are allowed to amend.		
"	" "	and motion for new trial is con-		
		tinued to Nov. 14th, 1903, 10 A. M.		
Dec.	5, 1903	Motion to amend complaint	49	
		Motion to amend Exceptions to		
"	" "	the Findings of Fact	50	
"	" "	Motion to Modify Decree	51	

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
Dec.	5, 1903	Exceptions to Findings of Fact No. 6	52	
April	2, 1904	Motion to amend complaint set for hearing April 8th, 1904, at 10 A. M.		
July	11, 1904	Motion submitted without argument, Plaintiff to file a brief within 20 days if necessary.		
"	26, "	Filed and recorded Decree, Recorded Judg. Record H, Page 510		
"	" "	Filed affidavit for attachment against Charles E. Williams	53	\$ 2.50
"	" "	Filed Order granting citation H 522	54	
"	" "	Issued Order to show cause handed T. N. Marlowe	55	
"	28, "	Filed Petition for appointment of Commissioner	56	
				143]
July	28, 1904	Filed Order Appointing Commissioner H.522-523	57	
Aug.	4, 1904	Filed & recorded Extending time to prepare Bill of Exceptions, H.524	58	
Sept.	13, "	Filed Bill of Exceptions	59	
"	14, "	Filed Notice of Appeal	60	
"	" "	Filed and Recorded Undertaking on Appeal	61	
Oct.	11, "	Filed Report of Commissioner	62	
"	" "	" Order discharging Commissioner	63	
Jany.	3, 1905	Received fee for Certifying Transcript		5.00
"	13, "	Filed Petition for Appointment of Commissioner	64	
"	" "	Filed and Recorded Order Appointing Commissioner	65	
March	12, 1906	Certified Copy of Decree		3.50
July	23, "	Filed Petition for Appointment of Commissioner for 1906	66	
"	" "	Filed and Recorded Order appointing commissioner for 1906 I.162	67	
Oct.	20, 1906	Filed Commissioner's Report for 1906	68	

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
July	17, 1908	Filed Affidavit etc.	69	
"	18, "	Filed Order citing Sebastian Effinger to appear	70	
"	21, "	Filed Order of Court	71	
Feb.	13, 1909	Seal		.50
July	21, 1910	Filed Petition for Appointment Water Com.	72	
"	" "	Filed Order Appointing Water Com.	73	
"	25, "	Filed Resignation Water Com.	74	
"	" "	Filed Order Appointing Water Com.	75	
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Jan.	14, 1910	Filed Report of Water Commissioner for 1910	76	
Aug.	18, 1911	Filed Petition for Appointment of Water Comm.	77	
"	" 1911	Filed Order Appointing & Oath of Office Rec. in Dok. K, 61	78	
July	27, 1911	Filed Report of Water Commissioner for 1911	79	
Aug.	5, 1913	Filed Petition for Appointment of Water Comm.	80	
"	6, "	Filed Order Appointing Comm. & Oath of Office	81	
"	9, "	Filed Affidavits charging W. R. Hamilton, Charles E. Day with Contempt of Court	82	
"	" "	Issued Order	83	
"	" "	Filed Order		
Jan.	10, 1914	Filed Notice of Hearing on Contempt	84	
Feb.	6, "	Filed Return of Hamilton & Day	85	
"	" "	" " " " " "	86	
"	7, "	Filed Notice of Intention to Apply for Commission to take Deposition of W. H. Raymond	87	
Mar.	3, "	Filed Deposition of W. H. Raymond	88	
"	20, "	Contempt proceedings set for hearing 3/30-14 10 A.M.		

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
July	23, 1914	Filed Petition for App. of Water Comm. season of 1914	89	
"	25, "	Filed Order App. Lacy Taylor, Water Comm. season 1914	90	
"	31, "	Filed Resignation of Lacy Taylor, Water Comm.	91	
"	" "	Filed Order accepting resignation of Lacy Taylor	92	
"	" "	Filed Petition for App. of J. B. Pruden, Water Comm. season 1914	93	
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July	31, 1914	Filed Order Appointing J. B. Pruden, Water Comm. 1914	94	
July	17, 1915	Filed Petition to appoint J. M. Price, Water Comm. Season 1915	95	
"	" "	Filed Order App. J. M. Price Water Comm. season, 1915	96	
"	26, 1918	Filed affidavit and application for citation	97	
"	" "	Filed Order for citation	98	
"	" "	Issued Citation	99	
"	" "	Filed Citation		
Aug.	2, "	Filed Answer Geo. Likes	100	
"	2, "	Geo. Likes in Court answering to Order to show cause		
"	9, "	Geo. Likes fined \$1.00 for contempt. Fine paid Aug. 12th, 1918, Receipt #3168		\$ 1.00
July	17, 1919	Filed Petition for appointment of Water Commissioner	101	
"	19, "	Filed Order appointing Water Commissioner Judg. Rec. H. Page 625 Seal	102	.50
Nov.	1, "	Filed Water Commissioner's Report (1919)	103	
Aug.	3, 1920	Filed Petition for appointment of Water Com.	104	
"	" "	Filed Order appointing Water Commissioner Rec. Judg. Rec. "O" 335	105	

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
Aug.	3, 1920	Filed Bond of Water Commissioner	106	
"	" "	Filed Oath of Water Commissioner	107	
"	27, "	Filed Report of Water Commissioner	108	
"	27, "	Filed Report of Water Commissioner Amended	109	
Aug.	8, 1921	Filed Bond of Water Commissioner	110	
"	8, "	Filed Order Appt. Water Commis- sioner Order Book G-7, pg. 84	111	
				[146]
Dec.	22, 1921	Filed Report of Water Commissioner	112	
"	22, "	Filed Order approving Water Commissioner's report	113	
Jan.	7, 1922	Filed Objections to Water Commissioner's report, etc.	114	
July	13, "	Filed Affidavit	115	
"	19, "	Filed Petition for Appoint- ment of Commissioner	116	
"	28, "	Filed Order Appointing Water Commis- sioner, Judg. P, page 283	117	
"	31, "	Filed Application for Citation	118	
"	31, "	Filed Order to Show Cause, Judg. Rec. P. page 285	119	
"	31, "	Issued Citation	120	
"	31, "	Filed Bond of Water Commissioner	121	
Aug.	1, "	Filed Citation	(120)	
"	7, "	Hearing on citation continued until Sept. 9, 1922		
"	25, "	Filed Water Commissioner's Report	122	
"	25, "	Filed Order approving Water Commissioner's Report, Judg. Rec. P. Page 304	123	
Sept.	9, "	Hearing on citation further continued until Sept. 11, 1922 at 9:30 A.M.		
"	11, "	On motion of counsel for de- fendant, E. J. S. Keen, Proceedings are ordered dismissed.		
"	12, "	Filed Memo. of costs and disbursements	124	

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
Jan.	11, 1924	Filed Affidavit	125	
"	11, "	Issued Citation	126	
"	14, "	Filed Citation	(126)	
				[147]
Jan.	14, 1924	Citation directed against Chas. Rassman dismissed		
May	17, "	Filed Application for citation	127	
"	" "	Filed Order Judgment Record Q. page 449	128	
"	" "	Issued Citation	129	
"	24, "	Filed Citation	(129)	
"	28, "	Filed answer of W. F. and Jas. K. Hughes to answer	130	
"	28, "	Filed answer of Byron & Harry Hughes to answer	131	
"	28, "	Citation dismissed as to W. F. and James K. Hughes on motion of counsel for plft.		
"	28, "	By agreement of counsel, hearing on citation continued until June 30, 1924, pending of trial of cause #7883		
Aug.	1, "	Filed Petition	132	
"	1, "	Filed Order for Citation Judgment Record Q. page 514	133	
"	1, "	Issued Citation	134	
"	2, "	Filed Citation	(134)	
"	5, "	Filed Affidavit	135	
"	5, "	Filed Bond	136	
"	5, "	Filed Order	137	
"	5, "	Issued Injunction	138	
"	5, "	Filed Injunction	(138)	
"	8, "	Cause on trial Steno. fees		\$ 6.00
"	8, "	Upon Motion of atty. for Def. Tucker, Citation dismissed and Restraining Order Dissolved		
"	9, "	Filed Petition	139	
"	9, "	Filed Order appointing Water Commissioner, Judgment Record Q. page 524	140	

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
Aug.	9, 1924	Filed Bond of Water Commissioner	141	
"	13, "	Filed Order dismissing Contempt Proceedings and Dissolving Injunction	142	
"	13, "	Filed Memorandum of costs and Disbursements	143	
"	14, "	Filed Motion to Retax cost & Notice of Motion	144	
Sept.	10, "	Filed report of Water Commissioner	145	
"	10, "	Filed Affidavit of Mailing	146	
Oct.	4, "	Filed Report of Water Commissioner	147	
"	4, "	Filed Order approving Report of Water Commissioner Order book G-8 page 111	148	
"	4, "	Filed Affidavit of Mailing	149	
"	22, "	Filed Protest of W. R. Hamilton to Comm. report filed Oct. 4, 1924	150	
Nov.	20, "	Plaintiffs motion to retax costs set for hearing Nov. 28, 1924, 9:30 A. M.		
"	20, "	Objections of W. R. Hamilton to Com. Water Report set for hearing Nov. 28, 1924 9:30 A.M.		
"	28, "	Motion to re-tax costs argued and submitted under advisement		
"	28, "	Protest of W. R. Hamilton submitted overruled		
Dec.	1, "	Filed Order approving Water Report	151	
"	1, "	Motion to re-tax costs sustained as to Attys. fees and Engineers services		
"	8, "	Filed order approving report of Water Commissioner	151	
July	20, 1925	Filed Petition	152	
"	20, "	Filed Order appointing Water Commissioner, Order Book G-8, pg. 303	153	
"	21, "	Filed Bond & Oath of Water Com. W. J. Teidt)	154	

(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
July	22, 1925	Filed Com. Report ending Aug. 21, 1925	155	
"	22, "	Filed Com. Report ending Aug. 31, 1925	156	
"	22, "	Filed Com. Report ending Sept. 15, 1925	157	
"	22, "	Filed Com. Report for season, 1925	158	
"	24, "	Filed affidavit of Mailing Notices	159	
"	29, "	Filed Protest of J. S. Kemp	160	
Oct.	19, "	Filed Order allowing fee of Water Commissioner	161	
June	5, 1926	Filed Petition for appointment of Water Com. for 1926	162	
"	9, "	Filed Petition for appointment of Water Com. for 1926	163	
"	12, "	Petitions heard, W. J. Teidt and Waldo Hunter appointed Water Coms.		
"	18, "	Filed Order appointing Water Commissioner for 1926, Order book G-8 page 543	164	
July	7, "	Filed Notice	165	
Dec.	16, "	Filed Water Report of Water Commissioners for 1926	166	
"	17, "	Filed affidavit of Mailing.		
Jan.	5, 1927	Filed protest of L. E. Tucker, et al.	166½	
"	24, "	Filed Order fixing time of hearing Protests	167	
"	26, "	Filed Order with Sheriff's return	167½	
May	14, "	Filed Order fixing fees and compensation Order Book G-9, pg. 186	168	
July	14, "	Filed Petition for Appointment of Water Commissioner	169	
"	23, "	Filed Proof of Publication	170	
Aug.	2, "	Filed Order appointing Water Commissioner for 1927, Order book G-9, page 251	171	
Aug.	2, 1927	Filed Bond	172	
Oct.	15, "	Filed Report of Water Commissioner	173 & 173½	
"	18, "	Filed Affidavit of Mailing Notices	174	
Nov.	14, "	Filed Order Fixing fees and compensation Or. Book G-9 page 319	175	

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(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
July	30, 1928	Filed Petition for appointment of Water Comm. 1928	176	
"	31, "	Filed Order appointing Water Commissioner Od. Bk. G-9, pg. 460	177	
Aug.	4, "	Filed Bond of Water Commissioner	178	
Oct.	11, "	Filed Report of Water Commissioner (1928)	179	
Nov.	9, "	Filed Affidavit of Mailing Water Notices	181	
"	14, "	Filed Order fixing compensation of Water Com. Od. Bk. G-9 528	182	
July	5, 1929	Filed Petition for appointment of Water Com.—1929	183	
"	11, "	Filed Order appointing Water Commissioner. Od. Bk. G-10 pg. 102	184	
"	16, "	Filed Oath of Office	185	
"	17, "	Order appointing Water Commissioner modified, bond \$1500.00 instead of \$2000.00		
"	17, "	Filed bond of Water Commissioner	186	
Oct.	7, "	Filed report of Water Commissioner	187	
"	7, "	Filed affidavit of Mailing Notices	188	
"	21, "	Filed Motion to Retax 1929 Com. Salary—L. E. Tucker	189	
"	21, "	Filed Motion to Retax 1929 Com. Salary—J. C. Sain	190	
"	30, "	Filed Order Fixing day of hearing Protest of L. E. Tucker, Or. Book G-10—234	191	
Nov.	5, 1929	Filed Praecipe for subpoena	192	
"	5, "	Issued Subpoena	193	
"	6, "	Motions of L. E. Tucker and J. C. Sain on for hearing and dismissed on Motion of Atty. for Protesters.		
"	7, "	Filed Order fixing fees of Water Com. Or. Book G-10 pg. 271	194	

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(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
July	10, 1930	Filed Petition for appointment of Water Commissioner	195	
"	10, "	Filed Order appointing Water Commissioner	196	
"	12, "	Filed Bond and Oath of Office of Water Commissioner	197	
Aug.	11, "	Issued Execution (J. C. Sain)	198	\$ 1.00
"	14, "	Filed Execution fully satisfied		
Sept.	26, "	Filed Report of Water Commissioner	199	
"	26, "	Filed Affidavit of Mailing Notices	200	
Oct.	23, "	Filed Order fixing fees of Water Com.	201	
Dec.	20, "	Issued Execution on Ed Ray	202	1.00
"	20, "	Filed Execution fully satisfied (See Water Report 1930)	202	
June	29, 1931	Filed Petition for appointment of Water Commissioner	203	
"	29, "	Filed Order appointing Water Commissioner	204	
July	3, "	Filed Bond of Water Commissioner	205	
Sept.	15, "	Filed Order Discharging Water Commissioner Or. Book G-10 pg. 556	206	
"	16, "	Filed Report of Water Commissioner	207	
Oct.	9, "	Filed Order fixing fees of Water Com.	208	
July	30, 1932	Filed Petition for Appointment of Water Com.	209	
July	30, 1932	Filed Order Appointing Water Water Commissioner	210	
Aug.	9, "	Filed Petition for discharging Water Commissioner etc.	211	
"	9, "	Filed Order for hearing on Petition	212	
"	15, "	Filed Notice of hearing and affidavit of service	213	
"	15, "	Cause heard Petition denied		
"	16, "	Filed Bond of Water Commissioner	214	
Sept.	10, "	Filed Report of W. J. Tiedt Water Com., 1932	215	
Oct.	5, "	Filed Order Fixing Fees & Com. of Water Com.	216	

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(Testimony of Joe McDonald.)

	Date	Proceedings	No.	Costs
July	29, 1933	Filed Petition for Appointment	217	
"	29, "	Filed Order appointing Water Commissioner	218	
"	29, "	Filed Bond of Water Commissioner Bond Book 101, page 105	219	
Oct.	2, "	Filed Report of Arthur Sticht, Water Com., 1933	220	
"	3, "	Filed Petition for increase of Water Com's Salary	221	
"	3, "	Filed Order Fixing Fees of Water Com.	222	
Nov.	3, "	Filed Order Fixing Fees of Water Com.	223	
(Duly Certified)				

As to Exhibit 3, and for the purpose of shortening the record, it is agreed in open court between the respective counsel that the same shows a judgment of date of February 15, 1932, entered in the District Court of Missoula County, Montana in an action wherein J. N. Boles and others were plaintiffs and Charles Martinson and others were defendants, Cause #11818 [153] of that court, in which the relative and various interests of the appropriators of Rattlesnake creek, so far as applicable to the water diverted through the Hollenbeck ditch, were adjudicated and determined, and those relative interests are as set out in Exhibit 3, now offered and admitted in evidence. The same, so far as material in this case, being set out in Findings of Fact II and VI of the Findings of Fact in said case; the same being in words and figures as follows:

(Testimony of Joe McDonald.)

II.

That a decree was duly given and made on July 9, 1903 by this court in an action wherein The Missoula Water Company, a corporation, was the plaintiff and Charles E. Williams, et al were the defendants; and said action was designated as No. 1953, which decree found and determined by Finding of Fact No. 10

“That the defendants H. C. Hollenbeck, Wallace P. Smith, Elmer E. Hughes, C. M. Owen, Emma Shilling, Mary F. Nesmith, Mamie E. Murray, Ollie D. Madison, Amanda Pound, H. C. Chattin, H. Hazleton, Adeline C. Briggs, Della T. Wright, Carrie B. Raymond, Beadie Moss, C. H. Moss, Effie M. Kilbourne, Thomas P. Street, A. H. Libby, W. A. Buzzwell, Mrs. E. H. Sherman, J. B. Frazier, J. E. Johnson, John White and Missoula County, by their predecessors in interest August 28, 1882, made an appropriation of (145) one hundred forty-five inches of the water of said Rattlesnake Creek by what is called the Hollenbeck Ditch, conducting water to the Hollenbeck Homestead.”

and said decree also found and determined by Finding of Fact No. 16 that the

same defendants made an additional appropriation of 50 inches by an extension of the said Hollenbeck Ditch to what is called the Daily Pre-emption Claim on July 1, 1888.

(Testimony of Joe McDonald.)

That by said decree it was concluded as a matter of law that the said defendants were entitled to the use and enjoyment of the one hundred forty-five (145) inches of water of Rattlesnake Creek, statutory measurement, of date August 28, 1882, and fifty (50) inches of date of July 1, 1888. [154]

VI.

That the rights of the plaintiffs and defendants, as tenants in common, respecting the use and division of the water flowing in said Hollenbeck Ditch is determined and fixed as follows, to wit:

Parties	Acreage	Quantity of Water
Lilian L. Boles	2.00	3.136
H. E. Sturm	2.50	3.95
W. M. Russell	1.50	2.352
Minnie E. Seeley	.50	.784
Loretta M. Smith	3.00	4.704
N. S. Lilly	3.75	5.86
W. J. Johnson	1.90	2.959
Inez E. Jackman	2.10	3.272
A. M. Rogers	2.75	4.332
Frank E. Smith	1.12	1.756
R. H. Miller	5.00	7.84
Orpha Miller Talbot	2.50	3.92
Constance E. Baker	2.00	3.136
Rose I. Downey	5.50	8.624
E. E. Warner & D. W. Warner	4.50	7.056
C. W. Leapheart	4.50	7.056
Chas. Rossman & P. Rossman	2.00	3.136

(Testimony of Joe McDonald.)

G. M. Reeves	1.50	2.352
Horace Green	1.00	1.568
John R. Day	1.00	1.568
Lulu O. Wohlschlager	2.25	3.563
A. L. Kagle	2.25	3.563
W. T. Burnett	2.00	3.136
Mamie V. Weir	1.00	1.568
Albert Free & Sam Mercer	1.75	2.74
E. C. Lucas & A. E. Bristow	1.25	1.96
E. R. Janes	.90	1.41
Agathy Brown	6.00	9.40
E. F. Roth	10.00	15.68
Missoula County	32.00	36.00
Tennie E. Greenough	10.114	15.85
Charles Hart	1.612	2.52
Frank A. Graehl	.912	1.43
Carl Peterson & Miss C. C.	10.73	16.82

Totals

133.388 A. 195.000''

Plaintiffs' Exhibit 3 as admitted for the limited purpose of showing the relative rights and interests of various plaintiffs in Right No. 10 and Right No. 16 of the Rattlesnake decree, Cause #1953.

C. W. LEAPHART, [155]

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is C. W. Leaphart; I live up the Rattlesnake; I am Dean of the Law School of the University of Montana at Missoula. I irrigate, like any other farmer, a small tract of land, and have water from the Hollenbeck Ditch. My relative interest in the Hollenbeck Ditch was determined in the decree Cause #11818, just introduced in evidence. I have resided up there since 1921, and have helped make observations of Rattlesnake creek water flow in the last few years. The first measurement, in which I participated was July 15, 1926. Others participated with me. We measured the water flow at the head of the Mill Ditch right under the streetcar track, through a ten foot weir.

Q. And what was the result of your measurement there?

Mr. WHITLOCK: That is objected to as referring to a time not material.

The COURT: Overruled.

Mr. WHITLOCK: Exception.

The measurement was taken at 5:45 in the evening and there was 4 and seven eighths inches depth of water going over the weir. I went up the stream to note the condition of the stream flow above the weir and there was no water coming over the dam. The water commissioner on the stream had shut the dam, so that no water was coming over. There was

(Testimony of C. W. Leaphart.)

then water flowing in the Fredline ditch. I made no further note of the stream condition at that time. There is always water flowing in the Fredline ditch. I have seen it every day, and never saw it dry. [156]

The water going through the weir where we measured was going into the Missoula river and the water in the Fredline ditch was going to the Hughes Brothers' gardens. During the years I have lived on Rattlesnake I have observed the relative flow during the summer months above the head of the Mill ditch. I go over it almost every day, and there is always water flowing to the Missoula river there through the mouth of Rattlesnake. I would estimate the amount as being about the same as that measured. I made other measurements at the same place on July 16th, 18th and 20th, and August 3rd of 1926.

Q. Will you give those measurements?

Mr. WHITLOCK: The same objection.

The COURT: Overruled.

Mr. WHITLOCK: Exception.

The result on July 16th, 18th and 20th was practically the same as July 15, roughly four and a half inches; on August 3rd, there was two and a quarter inches. I did not observe the stream condition above on all occasions, but upon at least one other I noted that the dam was shut down completely. Being asked as to what extent the agricultural rights are used, eliminating from consideration the rights of the Water Company, of course in the summer time when the water is getting short they use

(Testimony of C. W. Leaphart.)

all of it—all they can get. I have observed what happens when they are irrigating heavily above. In the year of Mr. Tucker's suit against the Water Company I noticed especially this fact or the year following, he irrigated very heavily and the result was drowning out the crops on that bench just below the bench I am on. It is about ten or twenty feet lower maybe in the neighborhood of the Howard Grocery. I have not observed as to the extent of the flow of the stream down near the head of the Mill ditch when they are irrigating heavily above.

CROSS EXAMINATION by Mr. Whitlock:

I acquired my property in 1921, and know nothing of water use on Rattlesnake prior to that date. The dam and diversion works of the defendant were constructed when I went up there, and the city supply was then being taken at the point where it is now taken. There was four and seven eighths inches depth of water on the weir at the time I measured on July 15, 1926, and four and a half on the 16th, 18th [157] and on the 20th, but on August 3rd, the amount had gone down to two and a quarter inches.

GEORGE CROMWELL,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is George Cromwell; I am a farmer living on Rattlesnake. I irrigate six acres from Rattle-

(Testimony of George Cromwell.)

snake. The land is known as the Nellie Sticht land. I have a life lease on it from Glen Sticht, who was the successor of Janet Sticht, who was a party to the decree. I take the water out of the Otto Quast ditch, No. 20, six inches. In July, 1931 my water was shut off and I was unable to get any more water that year, and suffered a complete crop failure for want of water. I gave up my own crop and worked out. 1932 was fair as to water, and this year I have had water. 1931 was an unprecedentedly dry year. I took possession of my land in January, 1931.

Thereupon it was agreed in open court between the respective counsel, concerning the land holdings and water rights of each of the other plaintiffs in this action, who have not yet been called as witnesses, they would testify as to their respective rights:

(a) That they all acquired their interest up there subsequent to the decree in Cause #1953, except Missoula County, who was a party to the decree in Cause #1953;

(b) That they are respective successors in interest to the parties in the decree in Cause #1953;

(c) That they severally own the lands which they alleged in the complaint to own, and that the lands require [158] water for irrigation to be profitably farmed.

L. E. TUCKER,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is L. E. Tucker. I reside in Los Angeles at the present time, but I did reside on Rattlesnake creek formerly. I owned land on Rattlesnake creek in 1910 or 1911, but in 1921, I acquired what is known as the Quast ranch, now in the possession of Joe McDonald, who preceded me as a witness here. In the possession of the Quast ranch from 1921 until my occupancy ceased, I had 45 inches in right 5; 40 inches in right 10; $220\frac{1}{2}$ in right 20; and 56 and $\frac{8}{10}$ in right 21 of Cause #1953, with which I irrigated approximately 170 acres. I began my occupancy of the Quast ranch in September, 1921, and stayed until October, 1929. During that period I made observations and measurements on Rattlesnake creek. I was present on August 7, 1924, when Mr. Ray, who testified here, made measurements of Rattlesnake stream flow. His measurements were made at my instance.

A. Yes sir.

Mr. WHITLOCK: That is objected to as not material in point of time.

The COURT: Overruled.

Mr. WHITLOCK: Exception.

A. 1640.8 inches.

That represented the entire flow of the stream, measured at four different points. During the seven

(Testimony of L. E. Tucker.)

or eight years that I was a user of Rattlesnake creek water, I observed the low water period, which was around August 7th, 10th or 15th. [159] The stream flow on August 7, 1924 was approximately the same as upon the same date of each of the other years. I never measured under 1600 miners inches of water in the stream.

I recall a measurement at a weir near the head of the Mill ditch in August, 1926. The weir was installed in Rattlesnake creek at the head of the Mill ditch by me with some help from my neighbors. It was a 10 foot weir, and we measured the water flowing through it every day for 30 days, sometimes in the morning and sometimes in the afternoon; that was in 1926, the first measurement being July 15, 1926. I observed the condition of stream flow higher up between this weir and up to the dam. The stream would be dry in places along that stretch, and some places would be more flow, and places there was water along the stream. Below the dam there was generally a little water going over the chute, sometimes it would be perfectly dry, but generally a little water wasting over. The bedrock varies on the stream, and the water raised with the bedrock; sometimes water would be exposed in the gravel in pools, and then, again, a hundred yards to 300 yards below the dam, the channel would be almost dry and you would find a place where there would be a little pool, and so on down clear to the city park, the Greenough park. The Hollenbeck ditch always had

(Testimony of L. E. Tucker.)

water; they could put a little dam out in the stream and catch all the seepage water and spring water, and there would probably be 35 or 40 inches for the Hollenbeck ditch. When we would have no irrigation above, that conditions would exist when there would be no water coming over the dam, or very little water, and the stream bed just below the dam would generally be dry. At the time when water was low and we needed water [160] the stream below the dam, as a rule, was dry—a very little running water for a short distance. There was some seepage water coming through in under the dam when the old dam was in, and we had more water, and we had more water then than after the new dam was put in, in 1924; I am not sure of the exact time. This dry condition of the stream bed continued down the stream to Greenough park, which is probably half a mile or three quarters above the road where I had installed the weir at the head of the Mill ditch. From the Greenough park down, there was mostly always some flow probably, some places the flow would be light, and some places heavy. At the bridge where the road crosses the Rattlesnake, you would generally see three or four hundred yards above the weir, and you could see a couple of hundred inches of water there. I don't think I ever saw it anywhere near dry. From there on down there would be some places where there would be considerable more water. Where the Fredline ditch came out, there was generally plenty of water com-

(Testimony of L. E. Tucker.)

ing out, by plenty of water, I mean probably five or six hundred inches. I never measured the water at that place. The water flowing in the stream at the head of the Fredline ditch came from seepage water through the banks of the stream and water that would raise in the bottom of the stream. There are no tributaries coming in from the sides. Eliminating the water used and claimed by the Water Company each year while I was on the stream we, meaning agricultural rights, used practically all the water we could get in low water—when the water was scarce in the stream, I would say all the decreed agricultural rights as far as there was water to supply them.

CROSS EXAMINATION by Mr. Whitlock:

My observation of Rattlesnake creek water rights does not date earlier than 1921. I said I made observations [161] of the stream flow below the dam and found some places where there was water and then further down a place where there wasn't so much, and then striking a place where there was a little more, and I usually observed some water flowing down where the bridge crosses the creek, which is close to town; that is on Cherry Street, I believe they call it, say about 300 yards above where the weir was in.

REDIRECT EXAMINATION by Mr. Wilson:

Q. I don't believe I asked you how much water was flowing through the weir whenever you made

(Testimony of L. E. Tucker.)

measurements, did I?

A. No sir, you didn't.

Q. Well, will you state?

Mr. WHITLOCK: That is objected to as not material as to time.

The COURT: Overruled.

Mr. WHITLOCK: Exception.

The COURT: Answer, Witness.

I had notes on the measurement, but I haven't the notes here. I remember our first measurement very well and several others. On July 15, 1926, we measured; there was a little more than four and a half inches depth of water on the weir. In setting the weir, a pool is formed up stream from the weir for about 15 feet, and a peg is driven level with the weir top and back far enough to be away from the break of the water, and we measured the water depth from the top of this peg, to determine the depth of water flowing over the weir and there was slightly more than four and a half inches at 4:00 in the afternoon when we measured it. The least I ever measured at any time was in the latter part of the measurements; along about the 5th, 6th or 10th of [162] August. Along in there it got down; one measurement I made in the afternoon was about three and three quarters inches; in the morning we had five inches at that time. At different times it would vary. I think the least I ever measured was three and three quarters and the most I ever measured was seven and a half

(Testimony of L. E. Tucker.)

inches going over the weir. The condition during those times of the stream bed below the dam, after about the 15th or 20th of July, there was never much difference as to the condition of the stream, because then about the water would all be taken out; that was in the stream. Sometimes when we had plenty of irrigation on the bench, the water would flow in the stream above the city park, and I have seen quite a bit of water flow in when we had plenty of water to irrigate. I never saw the Fredline ditch dry, only in the winter time when they turned the water out. There was always plenty of water there.

RECROSS EXAMINATION by Mr. Whitlock:

The water declined during the latter part of the measurements. It was the lightest about August 15th, running about an inch lighter on the 15th of August than on the 15th of July. My last measurement was about the 15th of August. It varied with the different time of the day you measured. In the morning you would get considerable more flow than in the afternoon. I was not present when Mr. Leaphart made his measurement.

ED NEWTON,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Ed Newton; I reside in Missoula and con- [163] duct a cabinet shop by occupation. I have lived in Missoula 43 years. I know the Mill ditch out of Rattlesnake creek. When I first came to Missoula, I lived right close to the head-gate. I used the ditch then for power in my shop, beginning in 1903 or 1904, somewhere in there. Prior to that time I had my home near the head of the ditch. The water ceased being used through the Mill ditch, as near as I can remember, either in the fall of 1905 or spring of 1906, I wouldn't be sure.

While it was used, the Mill ditch was used for a water wheel for power on Higgins Avenue; and when I say that the use ceased in the fall of 1905 or spring of 1906, I tie my recollection to the following incident:

I moved from there to the other shop that I built in 1907, and I used a motor then, electric power, because the water was shut off, and I used the water power from the water in the ditch until it was shut off, when I began to use the electric power. The mill for which the Mill ditch was used was a flour mill, and such use was prior to my use, which was a lumber mill and cabinet shop, which I conducted

(Testimony of Ed Newton.)

in the old flour mill. I did not know the ditch when it was used for flour mill purposes.

CROSS EXAMINATION by Mr. Whitlock:

When I used the Mill ditch for my cabinet shop, I was the only person on the ditch that you'd use it, and my use was discontinued in the fall of 1905 or in the spring of 1906. Prior to that time the use of the ditch had gradually declined to some extent. There wasn't as much water when I last used it as when I first used it.

WALTER M. HAY, [164]

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Walter M. Hay; I reside in Missoula; my occupation is carpenter shop foreman. I have lived in Missoula more than 45 years and have seen the Mill ditch off and on ever since I came there. My first acquaintance with the ditch was in making repairs. A good bit of it carried in flume and that would get out of repair and I have repaired it. The use made of the ditch was to run the water wheel down at the old Mill plant. I worked in Mr. Newton's cabinet shop after it was started there. The ditch was first used for a flour mill, and for a number of years, no use was made of it until Mr.

(Testimony of Walter M. Hay.)

Newton's cabinet shop was opened in the old flour mill, when it was used to run his machines and I worked for him. The use ceased in the fall of 1905 or spring of 1906.

CROSS EXAMINATION by Mr. Whitlock:

Prior to Mr. Newton's cabinet shop going into the old flour mill there was a good many years when no use was made at all of the water through the Mill ditch, and then the water was used to run the machinery in the cabinet shop of Mr. Newton. There wasn't a great quantity of water, still it took considerable to drive the wheel. There was supposed to be flow enough to keep the penstock filled up. The flow kept working down, getting a little less all the time. We had to wait at times for the penstock to fill up, but that was very seldom, and in the fall of 1905, I think, motor power use commenced and the water power ceased.

HENRY BERGSTROM, [165]

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Henry Bergstrom; I live in Missoula, and my occupation is cabinet shop employee for Mr. Newton. I have lived in Missoula about 30 years. I know the Mill ditch. My best recollection

(Testimony of Henry Bergstrom.)

is that the Mill ditch ceased to be used for the flowing of water in the fall of 1905 or spring of 1906. I have this recollection or acquaintance with the ditch: I went to work for Mr. Newton in the spring of 1905, and we used the water that year for water power.

JOHN J. FLYNN,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is John J. Flynn; I reside four miles west of Missoula and have lived in the vicinity of Missoula all my life.

I have known Mill ditch since I was a little boy. My offhand opinion is that the water ceased to be used in the Mill ditch in 1905, but I wouldn't say definitely. I mention this incident in connection with the later use of the Mill ditch, that is definitely fixed: My brother had a boy drowned in the ditch in 1903 in October, and necessarily there was then water flowing in the ditch. The ditch was closed, I thought, about a year or two after that—a couple of years after that. I couldn't say definitely.

HENRY PARTOLL,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows: [166]

DIRECT EXAMINATION by Mr. Wilson:

My name is Henry Partoll; I reside in Missoula, and have lived here for 43 years. I know the original Higgins ditch; I live in the near neighborhood or vicinity of that ditch and remember when water flowed through the Higgins ditch. I remember of water flowing about 1908 or 1909. By 1908 or 1909, I mean there was water in the ditch yet. I paid no attention to the first time I saw water in the ditch, but afterwards, in 1898, I bought ground there in block Q, and there were eight lots I bought, and then the ditch ran right through the lots; and then afterwards the ditch was taken around the corner off the lots, and in front of the sidewalk; that is the first attention I paid to the ditch. This ground was in Higgins Addition to Missoula, in block Q, on Spruce Street. It was still flowing in 1904, the full stream. My brother was out here, and he asked me where the water came from. That was in 1904. I think it flowed until 1909, and the water was used for irrigation west of town.

CROSS EXAMINATION by Mr. Pope:

A child got drowned on Front Street and my wife was so anxious of our child to get in there, that in 1906 I drove stakes so that the children couldn't

(Testimony of Henry Partoll.)

get under the bridge. The ditch was then right there across the street.

REDIRECT EXAMINATION by Mr. Wilson:

The boys that we were worried about, that made me drive the stakes were my two children. I had two small children. This boy, Albert, was born in 1904, and he is one of the children I was concerned about, when I drove the stakes in front of the ditch, and I had another child besides that, [167] born in 1903.

JOHN A. MORRELLIS,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is John A. Morrellis; I live in Missoula and have lived here for thirty-four years. The photograph, which you hand me, was taken at my home, and the stream of water shown in the photograph is the Mill ditch. The cart "transfer" was my wagon and that is me in the wagon. The picture was taken in 1904. The scene on the Mill ditch, represented by the picture, is on Cedar Street in Missoula.

Picture offered and admitted in evidence.

J. C. SAIN,

called as a witness on behalf of plaintiffs, recalled for further examination, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

When I came to Missoula in 1903, water was then flowing in the original Higgins ditch. I cannot remember how long after it continued, but that was my first year in Missoula vicinity, and it was then flowing.

CHARLES E. QUAST,

called as a witness on behalf of plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My name is Charles E. Quast. I live up Grant Creek near Missoula, and I am by occupation a dairyman.

I did live on Rattlesnake Creek from 1894 until 1920 or 1921, and was dairying on Rattlesnake creek. First I worked for my brother, Otto, and afterwards I had the [168] Peter Fedderson and Charlie Williams places. Otto was my brother and he occupied the land now occupied by Joe McDonald.

When I worked for him, I observed the extent of his irrigation, and he had all the water he wanted to irrigate with; and that was the case over a period of about seven or eight years, when I worked for him. After that, I occupied the Peter Fedderson and Charlie Williams places.

PLAINTIFFS REST.

[169]

DEFENDANT'S CASE IN CHIEF.

DEFENDANT'S TESTIMONY.

H. S. THANE,

called as a witness on behalf of defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

My name is H. S. Thane. My occupation, civil engineer. I am superintendent of Missoula division of Montana Power Company. I have had twenty-four or twenty-five years of study and experience, and have been employed by the Montana Power Company and its predecessors since 1910, and have been familiar with the system since then, and in charge of it since 1920. During my connection with that system, I have had occasion to observe the use and distribution of the water of Rattlesnake creek, and the flow of the stream both above and below the point of diversion. The water is diverted to supply the city of Missoula, at a point about three miles north of town.

I have prepared a map at the request of defendant's attorneys, showing the ditches and other points of interest on Rattlesnake creek.

The map is offered and admitted in evidence without objection as defendant's exhibit 6. [Original exhibit in custody of clerk]

The point where the water is diverted by defendant for the city of Missoula is marked "dam" on the map, and is situated near the center of Section 2. The intake of the old Higgins ditch was at

(Testimony of H. S. Thane.)

a point where the creek crosses the side line of section 11, and the old Mill ditch is somewhere between Broadway Street in Missoula and the Northern Pacific tracks. There is no particular designation of that on the map, [170] but it is slightly above East Pine Street, and within 100 yards of East Pine Street. It is a little over three miles from the "dam" to the Missoula River, which is the larger stream on the map, into which Rattlesnake creek flows. It is about three miles from the "dam" to the head of the old Mill ditch and about two miles from the "dam" to the head of the Higgins ditch. The scale of the map is 800 feet to the inch. The point of prior diversion made to serve Missoula prior to the present location of the "dam" is marked on the map "water works". The change of point of diversion from the point marked "water works" to the "dam" was made before I became familiar with the stream.

I am familiar with the chain of title to the "water works" system and the water rights now used and claimed by Montana Power. I briefly state the same giving dates starting back at the beginning: Frank L. Worden and wife and C. P. Higgins and wife to Missoula Water Works and Milling Company, December 31st, 1885, covering the water system, mill and water rights. The next transfer is from the C. P. Higgins estate to Missoula Water Works and Milling Company, covering the Higgins right, on October 22nd, 1895. The next is a transfer

(Testimony of H. S. Thane.)

from the Missoula Water Works and Milling Company by their change of name to Missoula Water Company, a Montana corporation, on November 2nd, 1895. Missoula Water Company, a Montana corporation, to the Missoula Water Company, an Oregon corporation, through Cornelius Sullivan, Trustee, on February 7th, 1898. The Missoula Water Company, an Oregon corporation, to Missoula Light & Water Company, an Oregon corporation, through John M. Keith, Trustee, on January 28th, 1904. Missoula Light & Water Company, an Oregon corporation, to Mis- [171] soula Light & Water Company, a Washington corporation, on September 18th, 1906. Missoula Light & Water Company to Missoula Public Service Company, on October 31st, 1924. Missoula Public Service Company to the Montana Power Company on October 31st, 1929.

The Montana Power Company is the present owner and defendant in this action. The Clark interests in the chain of title above were the Missoula Light and Power Company of Washington and the Missoula Public Service Company.

I have examined the decree in Cause #1953, previously introduced in evidence here, and I here list the rights given to Missoula Water Company, the plaintiff in that case, that are by number, amount and date as follows:

(Testimony of H. S. Thane.)

Number	Amount	Date
1	946 inches	1866
2	160 “	1868
3	131½ “	1871
4 (Part of)	65 “	1871
8	46½ “	1881
9	348 “	1881
14	645 “	1887

Since the decree, defendant and its predecessors have acquired the additional decreed rights:

Number	Amount	Date
5 (Part of)	115 inches	1872
11	130 “	1882
19	50 “	1892
20	65 “	1895
21	142 “	1895

Montana Power Company is now the owner of the system and water rights as I have described. I have prepared a chart, which correctly shows the relative position and location on the stream of the several rights claimed by plaintiffs in this case, and those claimed by the defendant. It is diagrammatic; the plat indicates by name the rights both [172] of defendant and all of the plaintiffs, who appear in this action.

Mr. WHITLOCK: We offer the chart, Exhibit 7, in evidence.

Mr. WILSON: We object to this, if your Honor please, as a conclusion of the witness and not testi-

(Testimony of H. S. Thane.)

mony of any fact in the case; and as to the location on the stream of the rights that is the subject in issue which must necessarily be determined by the Court.

The COURT: It may be introduced for what it is worth.

Mr. WILSON: Exception.

[Original exhibit in custody of clerk]

The red letters and figures indicate the rights which we claim to divert at the "dam", but are temporarily diverting in ditches, and they are listed under the various ditches and underlined in red. The same rights have a red line under them at their other points of use.

Describing the water system of defendant, the same consists of eight lake reservoirs—storage reservoirs at the head of the Rattlesnake in the mountains, a concrete diverting dam and settling basin which is located on the map here, and a 30-inch wood stave pipe 17,000 feet long leading to a reservoir on the hill—a 1,000,000 gallon concrete reservoir, and approximately 67 miles of distribution system ranging in size from 24-inch to two-inch.

Of my personal knowledge that system has been used to furnish Missoula since 1910, and there is no other system furnishing water to Missoula and its inhabitants, except a small private system that serves half a dozen customers. The head of the Mill

(Testimony of H. S. Thane.)

ditch is lower in elevation than most of the land in the city of Missoula and water could not be furnished [173] to the City of Missoula by gravity from that point. I have charge of the distribution of water through defendant's system and know what rights defendant claims to use in furnishing the city. Defendant uses all of its rights to furnish the city to the extent needed, and I have kept records of the waters used through the system over a long period of time. The measurements are determined by a Venturi meter located on the hill. It operates in a way that it makes a chart showing the amount used and I have the original of such charts here in court, from which I have prepared a table showing the maximum and minimum flow over a period of years (which table is produced by the witness). The table starts in 1905 and ends with 1933 and is shown in two sheets, which are offered in evidence as defendant's Exhibit 8, and correctly reports the amount of water as shown thereon for the period shown thereon.

Mr. WHITLOCK: We offer this, Defendant's Exhibit 8, in evidence.

Mr. WILSON: It is objected to upon the ground that it is immaterial, the right to the use of water not being in this case determined by the use which may have been made by the defendant, nor will the use which will be permitted in the future be determined by the use which may have been made heretofore.

(Testimony of H. S. Thane.)

The COURT: What is this supposed to represent, Mr. Whitlock?

Mr. WHITLOCK: The amount of water actually used by the Montana Power Company, the defendant, and its predecessors, in this case, extending over a [174] period of years from 1905 down to 1933.

The COURT: You mean the amount distributed?

Mr. WHITLOCK: Yes, your Honor; taken out of this stream at the dam as now located.

The COURT: Where did you measure it?

A. That is measured in the pipe—at a point in the 30-inch pipe.

The COURT: Where it leaves the dam?

A. Somewhere in that pipe, yes sir.

The COURT: That leads from the dam?

A. That leads from the dam, yes sir.

The COURT: I doubt if you find it material, but it may be introduced in evidence and in so far as entitled to no consideration the Court will give it none in making up its decision. For the sake of the record, overruled. [175]

(Testimony of H. S. Thane.)

EXHIBIT NO. 8.

WATER SYSTEM CONSUMPTION

Average Miner's Inches per day—From available records

							<i>Source</i>	
1905	November	309	(Max.	371	Min.	270)	Venturi Charts	
1907	January	300	"	371	"	247	"	"
1908	February	371	"	433	"	340	"	"
	March	340	"	371	"	309	"	"
	April	371	"	495	"	247	"	"
	June	525	"	680	"	433	"	"
	November	309	"	433	"	247	"	"
1909	July	680	"	990	"	433	"	"
	August	680	"	928	"	433	"	"
	September	618	"	742	"	494	"	"
1910	July	495	"	742	"	371	"	"
	August	565	"	742	"	371	"	"
1911	July	520	"	803	"	371	"	"
	August	520	"	742	"	309	"	"
1912	June	519	"	680	"	309	"	"
	July	556	"	927	"	371	"	"
1913	June	560	"	1050	"	371	"	"
1914	July	715	"				P. S. Commission Reports	
	August	630					"	"
	September	530					"	"
1915	July	732					"	"
	August	896					"	"
	September	Out of Order					"	"
1916	July	838					"	"
	August	810					"	"
	September	785					"	"
1917	July	947					"	"
	August	873					"	"
	September	780					"	"

THE MONTANA POWER COMPANY

Missoula, Montana

MISSOULA WATER DISTRIBUTION
SYSTEM CONSUMPTION

FROM

DAILY SYSTEM REPORTS 1917-1933

MONTHLY AVERAGE				TYPICAL DAY							
Year	Month	Avg. Day		Ave. Day	Date	Max. Flow		Min. Flow		Day	
		MG	M Inch			MG/24 hr.	M Inch	MG/24 hr.	M Inch	MB	Cons.
1917	July	15.3	947	15	16	990	10	618	15.1	934	Cons.
	Aug.	14.1	873	14	15	928	5	310	14.6	904	MB
	Sept.	12.6	780	18	13	804	5	310	12.4	767	
1918	July	13.8	854	25	15	928	11	680	13.7	847	
	Aug.	12.8	792	15	14	866	11	680	13.2	817	
	Sept.	13.1	811	14	13	804	11	680	12.8	792	
1919	July	14.1	873	14	16	990	10	618	14.1	873	
	Aug.	12.0	742	13	16	990	9.5	587	12.4	767	
	Sept.	10.9	675	14	11.2	693	8.5	526	10.9	675	
1920	July	13.8	855	16	15	928	10	618	13.3	823	
	Aug.	13.4	830	16	15	928	11	680	13.9	860	
	Sept.	11.6	718	21	12	742	10	618	11.4	705	
1921	July	14.0	865	14	16	990	11	680	14.7	910	
	Aug.	13.9	860	13	16	990	10	618	14.7	910	
	Sept.	10.7	662	15	11	680	9	557	10.4	644	
1922	July	12.8	792	14	16	990	10	618	11.9	735	
	Aug.	12.1	749	10	15	928	10	618	12.5	774	
	Sept.	11.8	730	15	14	866	10	618	12.2	755	
1923	July	12.7	785	14	16	990	11	680	13.0	805	
	Aug.	13.2	817	14	16	990	11	680	13.7	847	
	Sept.	12.8	792	14	15	928	11	680	13.0	805	
1924	July	10.7	662	11	14	866	6	371	10.7	662	
	Aug.	9.8	606	11	14	866	6	371	10.3	637	
	Sept.	7.6	470	14	12	742	5.5	340	7.9	489	
1925	July	10.9	675	10	15	928	7	433	11.2	693	
	Aug.	10.1	625	9	15	928	7	433	11.3	700	
	Sept.	7.4	458	11	10	618	6	371	7.3	451	
1926	July	12.8	792	13	17	1051	9	557	13.4	829	
	Aug.	10.6	656	16	16	990	7	433	11.3	700	
	Sept.	8.0	495	9	10	618	6.5	402	8.1	500	
1927	July	13.2	817	15	16	990	8	495	13.2	817	
	Aug.	11.1	686	17	15	928	8	495	10.4	643	
	Sept.	8.4	520	13	9	557	7	433	8.0	495	
1928	July	10.1	625	13	15	928	7	433	10.9	675	
	Aug.	10.9	675	14	15	928	6	371	11.7	724	
	Sept.	8.3	514	21	9	557	6	371	7.5	464	
1929	July	13.1	811	15	17	1051	8	495	13.6	841	
	Aug.	12.2	755	14	17	1051	8	495	13.8	854	
	Sept.	9.4	581	24	10	618	6	371	8.0	495	
1930	July	12.8	792	13	16	990	8	495	12.9	798	
	Aug.	11.7	725	15	15	925	8	495	11.5	711	
	Sept.	9.5	587	19	10	618	8	495	9.0	556	
1931	July	12.0	743	17	18	1112	7	433	12.5	774	
	Aug.	10.8	669	19	17	1051	6	371	11.0	680	
	Sept.	7.3	452	15	8	495	5	310	6.8	421	
1932	July	11.4	705	15	16	990	7	433	11.4	705	
	Aug.	10.8	669	15	16	990	7	433	12.0	742	
	Sept.	8.6	532	16	14	866	6	371	10.3	637	
1933	July	12.3	761	14	16	990	8	495	12.9	798	
	Aug.	9.7	600	13	17	1051	6	371	11.0	680	
	Sept.	6.6	408	16	7	433	5	310	6.7	415	
1933	Jan.	Avg.		375							

(Testimony of H. S. Thane.)

During my knowledge and recollection of Rattlesnake creek, I know of no addition to the natural flow of that stream from any source to that part of the stream below the "dam" as now located and shown on the map. I have heard reference to water that may be observed at times in the bed of Rattlesnake creek at a point close to the Hollenbeck ditch intake and have observed water at that point at times. The source of that water in my opinion is creek water that has flowed over the "dam" and has arisen at that point, if it went down. Sometimes it flows continuously. I have observed the presence of water in the bed of the stream at about the location of the head of the old Mill ditch, and at times when there was less water above.

Q. And from your experience and observation, to what source do you attribute that water?

The COURT: What water is this, now?

Mr. WILSON: We object to that upon the ground that it would be immaterial what the source of it is if it is Rattlesnake Creek water unless it comes from an independent source there outside of the watershed of the Rattlesnake.

The COURT: You may answer. Insofar as not entitled to consideration the Court will give it none.

Mr. WILSON: Exception.

A. I think it is water that came down the stream at some prior time.

The COURT: I guess you all agree on that.

Mr. WHITLOCK: I don't know.

(Testimony of H. S. Thane.)

In my opinion, the water being observed at the head of the Mill ditch when there is no water at points above may be [178] accounted for from the fact that the flow over the "dam" in dry seasons is intermittent; it takes time for the water which passes the "dam" to reach the head of the Mill ditch, so that it is possible that if you observe it at certain times you will find none up above and some water below. The time required in days or hours for the water to get down to the head of the Mill ditch is quite variable, and I could not make a general answer to that. If the flow is large and the stream full of water it is only a matter of hours, and if the stream is dry, it would be a matter of days or weeks. As to whether or not a larger or smaller amount should be observed in the morning at the head of the Mill ditch rather than at other times of the day, there would be a larger amount in the morning as there has been an intermittent flow over the "dam", which was at its maximum in the early hours. If most of the water ran over the dam at, say, 2:00 o'clock in the morning and decreased or stopped I think that the reflection on Pine Street at the head of the Mill ditch would show more water in the morning than it would in the afternoon. I have made observations at the head of the Mill ditch and observed and read the weir in 1926, testified to by Mr. Tucker. The weir was completed on July 15th or 16th—a 10-foot weir. At 11:50 of July 16th the depth of water over the weir was four and three

(Testimony of H. S. Thane.)

quarters inches, equivalent to 340 miners inches; again at 11:40 and 11:50 on July 16th and 17th there was 340 miners inches; on the 26th at 1:40 P. M. there was 210 miners inches; on the 30th at 11:40 A. M., 139.2 miners inches and on August 3rd at noon, 148.4 miners inches; on August 10th, the weir had been removed. The amounts of water according to my records, were constantly diminishing. I explained the presence of water [179] at the head of the Mill ditch by the fact that if the water is shut off at the "dam" so that the creek bed is dry, the water will appear at the head of the Mill ditch for some time. It will gradually decrease and may be some water there for weeks. I don't know how long it would take to stop running, but it is my opinion that it would ultimately stop running if there were none coming in over the "dam".

I made some other measurements at the head of the Mill ditch in the year 1929, and these are the results:

A. On September 20th, 1929, I measured the creek at Pine Street, (head of Mill ditch) at 3:30 p. m. with a current meter and found a flow of 121 miners inches. Then we installed a weir there which was completed on October 23rd, 1929. At that time there was 52 miners inches at 3:00 p. m. And on October 24th, at 11:00 a. m. there was 47 miners inches. On October 25th at 4:40 p. m. there was 38 miners inches. And those readings continued about that way until November 2nd, when we had 62

(Testimony of H. S. Thane.)

inches. It had increased slightly. And I continued the readings until November 16th, when it showed 101 inches. These quantities—I estimated five miners inches leakage, so I think that should probably be increased five inches. That would make the minimum reading 43 inches, and the minimum reading was what I was interested in primarily.

Q. Mr. Thane, if you were dealing with a volume of water which we will fix at 946 inches, having in mind two points for diverting it, one being the head of the old Mill ditch and the other being the present dam of the defendant company located as you have indicated, at which point of diversion would there be the smaller amount of water left in the stream for use of those users located between the dam and the head of the Mill ditch? [180]

Mr. WILSON: That is objected to upon the ground that it is not a subject upon which the witness may express an opinion, and passing upon the result which the Court must determine.

The COURT: I think sustained.

Mr. WHITLOCK: This witness is an expert, if your Honor please—

The COURT: That is the very issue. Proceed.

At the “dam” the flow of water is regulated by automatic volume valves. As there is more demand for water in town, the pipe automatically lets more water in. When the demand decreases, the pipe automatically reduces, and water not used through

(Testimony of H. S. Thane.)

that automatic control goes over the "dam" down stream.

Q. Have you any figures here, Mr. Thane, as to the cost of the diversion works of the defendant company?

Mr. WILSON: To which we object upon the ground that it is not material in this case, if your Honor please; upon the ground that the defendant's rights cannot be—to the use of water could not be increased by the construction of their diversion works.

Mr. WHITLOCK: It bears on the question of laches.

The COURT: Well, it may be immaterial, but it is in their answer, and if not material and entitled to consideration the Court will give it none. For the sake of the record, overruled.

The original work at the diversion dam was about \$20,000.00; additions in 1924 about \$56,000.00; the pipe line cost about \$85,000.00; the reservoir on the hill about \$22,000.00; [181] and the distribution system represents in excess of \$500,000.00. Since 1902, there has been expended in repair and in replacement in the system upwards of \$150,000.00, of which \$56,000.00 was in diversion works in 1924, when we replaced the existing wooden dam with a reinforced concrete structure on the same foundation. When the defendant acquired the system, its book value was \$1,000,000.00 and since then \$25,000.00 has been expended in repairs, also an additional one-half mile of pipeline replacement, costing \$15,000.00.

(Testimony of H. S. Thane.)

From the records it appears we were using just about as much water in 1905 as we are now using in 1933. In between, the use fluctuated, but not greatly; the table shows, and I believe, there has not been any material change in the amount of water used in the last 15 or 20 years.

CROSS EXAMINATION by Mr. Mulroney:

The water-works designated on the map, defendant's Exhibit 6, was before my time and I can't testify to that except the information I received. Exhibit 8 states the average number of inches used per day in each month listed from 1905 to the present time, for instance the very first one, November 1905, 309, that would be the average inches used per day during that month, and so on all the way through. Adding right No. 1, 946 inches and right No. 2, 160 inches makes 1106 inches; and if you add what defendant had for right No. 3, being $13\frac{1}{2}$, No. 4 being 65, No. 8 being $46\frac{1}{2}$, No. 9 being 348 and No. 14 being 645, I have 1118 inches, in addition to 1106 for rights No. 1 and 2 and the other rights acquired by defendant amounting to 502 inches, making a total of 2726 inches, which is the total amount claimed by the defendant. [182]

Referring again to Exhibit 8, it appears that the amount used in November, 1905, which was 309 inches, gradually increased to a top of about 896 inches. November is not in the irrigation season,

(Testimony of H. S. Thane.)

and more city water is used in irrigating season. If we had the records for the 1905 irrigation season, I expect it would be comparable and not greatly different in amounts from the rest of the irrigation seasons. For instance July and August of 1910 being 495 and 565 respectively, and the amount has increased so that in 1917 in irrigating season it reached 900 inches or thereabouts. The average consumption for 1913 is 767 inches for August, 408 inches for September and the highest amount, maximum rate of flow, shown in Exhibit 8 is 1112 inches, and that is the flow for July 1931, which is the highest that is shown, I think, on Exhibit 8 and is higher than the average. Excluding the Higgins and Mill ditches, defendant would still have 770 inches, which is about the average amount used from 1905 to 1910, but is not higher than the peak. The pipe of defendant from the dam to its reservoir, calculating roughly, is 1500 miners inches, which is probably what it would carry if pushed to the limit; while defendant claims to own 2726 inches, which includes the agricultural rights, I don't think defendant ever carried quite 1500 inches through its pipe.

I have never seen Rattlesnake creek dry at the head of the Mill ditch, almost but not quite. There is seldom 24 hours that water doesn't go over the dam at all. I haven't been at the head of the Hollenbeck ditch to know whether or not there are times when water does not flow past that point.

(Testimony of H. S. Thane.)

REDIRECT EXAMINATION by Mr. Whitlock:

[183]

There are two channels of the creek near the head of the Hollenbeck ditch; they are shown on the map. The channel forks at a point below the "dam" and come together again further down.

Mr. WHITLOCK: If the Court please, while this witness is on the stand, to preserve the record, I desire to make an offer of proof along the line suggested. I have written it out.

(The defendant's Offer of Proof No. 1 was submitted to counsel for the plaintiffs.)

Mr. WILSON: We object to the offer on the same grounds stated in the objection to the question upon the same point.

The COURT: Well, read it.

Mr. WHITLOCK: "We offer to prove by the witness now on the stand that it is his opinion from observation of Rattlesnake Creek that if the water now diverted by the defendant at its dam were allowed to flow down to the head of the Mill ditch and were there taken out that there would be a loss in the quantity in the stream and that there would therefore be less available for supply of agricultural rights of the plaintiffs."

Mr. WILSON: Our objection is that it is not a matter upon which——

The COURT: That is obvious. Whatever water goes over the dam there is necessarily some evaporation, whether there will be seepage or not to take its place. Objection sustained. [184]

Mr. WHITLOCK: Exception.

JOHN M. BRECHBILL,

called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

My name is John M. Brechbill. I have been a carpenter all my life, but I am running an elevator now. I was in the contracting business once, and have lived in Missoula about 37 or 38 years. I know the location of defendant's diversion dam on Rattlesnake. I built the dam in 1902, starting in the fore part of June after the freshet went down in 1902 and finishing so that water was running through right after the first of December of the same year, and water was diverted to supply Missoula before the end of the year, I am certain; and the city supply has never been changed since then.

The dam was built on 12 by 12 fir timber on bed rock, a permanent structure, with concrete foundation, extending clear across the creek. We did blasting in the construction. The dam lasted until it was torn out in 1923, and a concrete dam was built right on the same bed rock and location. The new dam was a little wider at the bottom than the old one.

Mr. WHITLOCK: We have an admission that counsel have agreed to to shorten the record, your Honor. The defendant herein is the successor in interest by mesne conveyances of the Missoula Water Company, the plaintiff in cause No. 1953 heretofore tried in the District Court of the Fourth Judicial District of the State of Mont- [185] ana in and for the County of Missoula, and its predecessors, and

(Testimony of John M. Brechbill.)

has succeeded to all of the property of said company and its predecessors, including the water rights decreed to it in said cause. The defendant is and its predecessors in interest were at all the times referred to in the pleadings herein public utilities, owning and operating the water system and works used to divert water from Rattlesnake Creek, the stream involved in this action, and distribute said water to the city of Missoula, Montana, and its inhabitants, and fire protection and general household, domestic, irrigation and other useful purposes, this defendant and its predecessors being authorized to engage in the sale and distribution of water, and being the owner of the franchise granted by the City of Missoula, a municipal corporation, of the State of Montana, giving a perpetual right to the use of the streets and alleys of said city for pipes used to serve the city and its people.

Mr. WILSON: Well, I think we can agree to that with this qualification, that we do not agree that the fact of its being a public service corporation increases its rights.

The COURT: Certainly.

Mr. WILSON: But it has succeeded to such rights as its predecessors had.

T. T. McLEOD, [186]

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

My name is T. T. McLeod; I live at Mill City, Oregon. I formerly resided in Missoula and left

here in 1911. Up to that time I was familiar with the water works system supplying Missoula. My acquaintance with the system began in 1893. I was manager of the water works during that period, and Missoula Water Works and Milling Company owned the system. I ceased being manager in January, 1907. I have been up to the dam where the water is now being diverted to the system, in the last few days, and recognized the location of the dam upon the maps in evidence here. In 1893, the water was being diverted to furnish the city of Missoula at a point on Rattlesnake, between a quarter and a half mile below the Fedderson ranch and barns, which point is shown on defendant's Exhibit 6 by the words "water works". My memory is refreshed as to this by my recent visit, and my answer is given in the light of my recent visit. The point of diversion for the city supply was changed and the new pipe line built in 1902 from the point shown on defendant's Exhibit 6 with the words "water works" to the present point of diversion at which the present dam is located, and I have verified that by my recent visit. The work for the diversion at the present location commenced in 1902 and was finished the same year; and from then forward the water for the city supply was diverted at the present diversion dam, and the point of diversion previously used was abandoned.

Q. What was the reason for going up to the present point?

Mr. WILSON: That is objected to upon the

(Testimony of T. T. McLeod.)

ground that [187] it is immaterial and has no bearing upon the issues in this case.

The COURT: Oh, I should think so. Get more fall?

Mr. WHITLOCK: That was one of the reasons, your Honor.

The COURT: He may answer. For the sake of the record. Overruled.

Mr. WILSON: Exception.

The water was contaminated and we wanted to get higher up on the stream, so as to get a greater head. I remember the old ditch, called here Mill ditch, and it was used in the old days for running the flour mill, but that was before my day in Missoula. I knew the old Higgins ditch. It came out of Rattlesnake just below the water company's old diversion point that we abandoned, and ran down to what we knew then as the Marshall ranch west of town. Water that was flowing in either the Mill ditch or old Higgins ditch, if wasted out of the ditches, or when used from those ditches, would not find its way back into Rattlesnake Creek. Those ditches were being used when I came to Missoula in 1893.

Q. Now, in your capacity as manager of the company, which you say began in 1893, what water rights were you claiming through the old flume?

Mr. WILSON: That is objected to, if your Honor please, upon the ground that the water rights of the predecessors of the defendant were fixed and

(Testimony of T. T. McLeod.)

determined by the decree in cause No. 1953, and the defendant may not now vary, contradict or impeach that decree.

Mr. WHITLOCK: No intention of doing that. Merely that at the time when the point of diversion was [188] changed to this present point this decree was rendered.

The COURT: Well, he said so. The point of diversion was changed in 1902.

Mr. WHITLOCK: But I am asking him as to the rights they claimed to use before the old point of diversion——

The COURT: Well, are you claiming any other rights than this decree gives you?

Mr. WHITLOCK: Certainly not, your Honor, but we are trying to ascertain what rights were claimed to be used through the old water works ditch.

The COURT: Before the decree?

Mr. WHITLOCK: Before the decree. The decree is silent.

The COURT: I think you may answer. Overruled.

Mr. WILSON: Exception.

A. We used the water that the company claimed as their oldest rights. That is my understanding of that.

Q. The company at that time was the owner of the old Mill right, was it not?

A. Yes sir, yes.

(Testimony of T. T. McLeod.)

Q. And the use or the place of use through which you claimed those old rights was the one that you have located——

A. Yes.

Q. —— on the map, that is marked “water works?”

A. Yes, yes sir.

Q. And when you moved up from that point to the present location of the dam, did you continue to use those rights and claim them?

A. No, the lower—— [189]

Q. You abandoned the old ditch?

A. That is it. We used it up to then.

Q. What about the rights? Did you claim the same rights?

A. We claimed the same rights.

Q. Did you have any intention of giving up your water rights?

A. None. I never heard of such a thing.

The Mill ditch and the old Higgins ditch were discontinued, both ditches in 1906; and while I was here and at the time the property was purchased by Senator Clark. Before that time and before the two ditches were finally discontinued, the amount of water flowing in them kept diminishing. After we moved up to the new point in 1902, the water was diverted through a closed pipe; formerly at the old point, we used just a common flume; we just had a wing dam in the creek bed and a wooden flume led out, and the water came into the flume, which was covered over with plank and dirt. The

(Testimony of T. T. McLeod.)

pipe line is more efficient, and when the pipeline was installed, we used less water, which continued until I left in 1907. There was no source of supply during the time I was connected with the water company bringing additional water into Rattlesnake between the point of location of the present dam and the head of the old Mill ditch.

I didn't do much to keep up the Higgins and Mill ditches while I was in charge here, kept them open a little so that we could get water through them—the Mill ditch; we cleaned them out a little; we couldn't get enough to supply Mr. Newton that year. We did no work of upkeep on it or on the Higgins ditch.

CROSS EXAMINATION by Mr. Mulroney:

From 1893 up until the time of the change in 1902, the point of diversion of the water company was above both Mill ditch and the old Higgins ditch. During the years 1902, 1903 and 1904, I would say we used more than 300 or 400 inches of water, but I couldn't tell you how much more. I have only one [190] measurement of it in the ditch. I have a record of a measurement in April on the old flume; I can't remember the year; and we were using about 9,000,000 gallons. The engineer will have to figure how many inches that is, for I don't know. I think we used more than 300 or 400 inches prior to 1905. It would not be much different in 1904, 1905, and 1906 than it was in 1901, 1902 and 1903. The company claimed to use the rights that were the earliest rights. I was present at the time the

(Testimony of T. T. McLeod.)

decree on Rattlesnake was entered in 1903, and we used the water; and it was my understanding that we were entitled to the oldest decree. It is true that we made no claim to this right, that right, or the other right, but merely turned water into the head of the works and let it run. It was under the decree. My memory is that the Higgins ditch and the Mill ditch were closed in 1906, and that they were operated up until 1906.

C. H. McLEOD,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

My name is C. H. McLeod; I have lived in Missoula 53 years. I was a director of the Missoula Water Works and Milling Company that owned the water works in the 90s. The principal use made of that water by the company was for irrigation, water power, and city use. In the latter 90s, the water was diverted out of Rattlesnake near the Fedderson ranch.

Q. What rights did your company claim at that time?

Mr. WILSON: To which we object upon the ground, if your Honor please, that the rights to the use of the waters of Rattlesnake Creek were set-[191] tled and adjudicated in the decree in cause

(Testimony of C. H. McLeod.)

No. 1953, which is conclusive upon all parties and their successors, and may not be contradicted or——

The COURT: Any new parties in this action? Are there any new parties in this action?

Mr. WILSON: I don't think so. There are none so far as I know. These are all parties or successors to parties in cause 1953, both plaintiffs and defendant in this action.

Mr. WHITLOCK: Plaintiffs claim to be successors in interest to those who were parties to that action.

The COURT: I think he may answer, and if it is not material or competent or entitled to consideration the Court will give it none. For the sake of the record, overruled.

Mr. WILSON: Exception.

(The question was read by the reporter.)

A. Well, we claimed, I think, 160 inches in the Higgins ditch.

Q. How about the Mill ditch?

A. Well, we claimed—I don't remember but it was all the ditch would carry; whatever it would carry we claimed the Mill right, yes sir.

Q. Did you claim to use those rights for furnishing Missoula?

Mr. WILSON: That is objected to upon the ground that it is hearsay and not any fact upon which water rights could be based.

The COURT: Well, I don't know how you are going to identify the rights except by what they intended or what they were doing. Overruled. [192] You may answer.

(Testimony of C. H. McLeod.)

Mr. WILSON: Exception.

The COURT: If it is not entitled to consideration the Court will give it none.

Q. Did you claim to use the Mill right and the Higgins right to furnish the city of Missoula?

A. Yes sir.

Q. From the point that you have referred to?

A. Yes sir.

Q. And do you know whether or not the point from which you furnished Missoula was thereafter changed?

A. It was.

The point of diversion was moved up stream to the present location of the water works dam. I have observed Rattlesnake Creek and its water condition at the head of old Mill ditch. During the years that I have lived here I have had occasion to observe Rattlesnake Creek frequently and with particular reference to that part of the stream where the old Mill ditch used to take out. I have seen some seasons that there was no water in that stream at that point. I can't tell just how many seasons but I expect ten or fifteen years since I have been here when the stream was dry at that point.

CROSS EXAMINATION by Mr. Mulroney.

You understand me to say that at the point where the old Mill ditch came out down by the Northern Pacific trestle—

In the course of my observation here I have seen

(Testimony of C. H. McLeod.)

it absolutely dry some ten or fifteen times. During all the years that I have been here I think that the Mill ditch had water in it every year up until 1906 and that is also true of the Higgins ditch. I think perhaps the water was curtailed in those ditches some years when there were very dry years in order to give the city a proper supply.

REDIRECT EXAMINATION by Mr. Whitlock.

Q. The city use was the principal use, as I understand it.

A. Yes, sir, that came first.

WALTER M. HAY,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

I have previously testified for the plaintiffs and I knew the old Higgins ditch. It ran through town here in the four hundred block on Spruce Street, then it crossed to this [193] (the south) side of Spruce. I can't tell the exact location as to say whether it crossed Higgins Avenue. My best judgment is the Mill ditch was discontinued in the fall of 1905 and the Higgins ditch was discontinued two years before that, which would be about 1903 or 1904.

(Testimony of Walter M. Hay.)

CROSS EXAMINATION by Mr. Mulroney:

I am not positive whether Mill ditch was closed in the fall of 1905 or the spring of 1906, but the Higgins ditch was closed two years before that, as I remember; but I am not positive of the dates.

REDIRECT EXAMINATION by Mr. Whitlock:

I lived in the 400 block along the Higgins ditch; it ran along the side of the street, and I was over to it.

C. H. CHRISTENSEN,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

My name is C. H. Christensen; my business is manager of the Missoula division of the Montana Power Company, the defendant in this action, and I held a similar position with its predecessors, the Missoula Public Service Company and the Missoula Light & Water Company. I have been connected with the water utility supplying Missoula since 1893. Defendant acquired the system November 1, 1929. I know the location of the dam where water is diverted to furnish Missoula and its inhabitants, and have known that location since 1902; water has been diverted at that point since then continuously and no other point of diversion has been used since that date by the companies owning the utility. The change made in 1924, was to rebuild the dam, which

(Testimony of C. H. Christensen.)

was formerly timber and which is now concrete. The point [194] of diversion was not changed. I remember where water was diverted prior to 1902 to supply Missoula, which was about an eighth of a mile below the Fedderson barn and above the old Higgins ditch, and of course, the old Mill ditch, which two old ditches I remember; and I also remember the old water works flume. I don't remember the year when the use of the Mill ditch was discontinued, but I know it was discontinued. The water suit to determine Rattlesnake Creek rights was tried in 1902 and decree thereafter signed. The water was being diverted at the present point in 1902.

Q. Now, since your connection with the company, Mr. Christensen, what rights have you claimed to use from Rattlesnake in furnishing the city of Missoula and its people with water?

Mr. WILSON: We object to that as calling for hearsay, a self-serving declaration and immaterial, and not testimony of any fact involved in the issues in this case.

Mr. WHITLOCK: I am asking in his capacity as manager of this company.

The COURT: I think you may answer, and if not competent or material the Court will ignore it in making up its decision. Objection overruled.

Mr. WILSON: Exception.

A. We did not use any particular right. We used out of your first three rights, 1118½ inches, all the water that was demanded by the system.

(Testimony of C. H. Christensen.)

When I say our first three rights, I included the Mill right, the original Higgins and a 13½ inch right. I knew the conditions of Rattlesnake Valley as to irrigation prior to 1902. As a young man, I worked in the Rattlesnake Valley, in 1893, and [195] there was very little land under cultivation in that section where the poor farm is now or where the poor farm then was. I have observed the water supply available for agricultural use, both before and after the year 1902.

Q. What have you to say as to whether or not there was more or less available after 1902?

A. There was less—there was more.

Mr. WILSON: That is objected to because it is all concluded by the decree in cause No. 1953, which cannot be impeached or contradicted by any party.

The COURT: What is the object?

Mr. WHITLOCK: I am trying to show now from this witness, if he knows, the extent of the use of this particular defendant and its predecessors, and the effect that it may have had, having in mind the amount of water it used and the amount left for other use.

The COURT: Well, I can't see that it is very material. We will let him answer and have it in the record, and insofar as it is not material or competent the Court will ignore it in making up its decision. Overruled.

Mr. WILSON: Exception.

There was more water available after 1902, which

(Testimony of C. H. Christensen.)

was after we moved up to the present point. The works, particularly the dam, by which the water is diverted and furnished to Missoula, is a dam 13 feet high and 50 or 60 feet wide, and an earth dam that is a couple of hundred feet long and extends up through the mill pond over to the eastern shore of the creek. The dam, of course, can be easily observed in the stream. The water is [196] conveyed from that point by a pipe to a circular distributing reservoir that defendant has just north-east of town, which is 17 ft. deep, 105 feet in diameter and contains 1,000,000 gallons of water. It is concrete, and was built also in 1902, and put in use that year; it has been used continuously since that year. During my managership, I have claimed the right to use these structures for the diversion of water for defendant, and such use has not been interrupted nor interfered with.

CROSS EXAMINATION by Mr. Mulroney:

I have been an employee of the company since 1893, and have been familiar with the stream during that period. I think 1600 or 1700 inches is a high estimate of the flow during July and August, but that must be so if the water commissioner's reports so show. From my own observation, I would say 1400 inches. The chart, Exhibit 8, shows my company used 300 or 400 inches in 1905, which is about right. I have no recollection as to that time. All I know is from the chart. From my recollection and experience, I would say that the use in 1905 was about as it was in 1902, 1903 and 1904, and also prior to that time, so that when the change

(Testimony of C. H. Christensen.)

was made from the water works flume up to the dam in 1902, we were using presumably 300 or 400 inches of water, which continued to about 1905, when it increased, and I think we now average about 900 inches, and that is in July and August, when people have to irrigate.

As to the claim to specific water rights used in 1902, I had nothing to do with that then, and I don't know what claim was made at all in 1902 nor until 1914. I was an employee of the water company in 1902 and the change was made as indicated in that year. I can't say as to the amount of water used; I don't know how much was used through the flume before the change was [197] made in 1902. The reason that I answer that there was more water for the farmers after the water company's point of diversion was moved up, is because I used to go fishing in Rattlesnake Creek before 1902 and there was always plenty of water and good fishing, and there wasn't anything after 1903 and 1904; after the Mill ditch and Higgins ditch were abandoned there wasn't any more water—much more water in the creek than there is now in the summer time.

Q. Well, of course, those ditches carried water, you say, up to about 1906?

A. Well, whatever year it was.

The COURT: Well now, let's get this straight. You say you judged after 1902 there was more water available for the farmers?

(Testimony of C. H. Christensen.)

A. Up above.

The COURT: Above?

A. Above the dam.

The COURT: Above the dam?

A. Yes sir.

The COURT: What ditches are taken out above the dam?

A. Well, those three ditches were taken out above the dam.

The COURT: But after the dam was put in there was less water below?

A. There was very little water down below.

The COURT: After you put in your dam?

A. Yes sir.

REDIRECT EXAMINATION by Mr. Whitlock:

There were many ditches down below used by agricultural users after the dam was put in. After the change to the dam was the time when the district up there began to build up [198] around the poor farm. Going back to the time before the Higgins and Mill ditches were discontinued, the farmers had less water than they had after the Higgins ditch and Mill ditch water was diverted at the reservoir.

RECROSS EXAMINATION by Mr. Mulroney:

I know that the only ditches taking out above the dam are the Effinger, 100 inches, the Williams, 160 inches, the Quast, 328 inches and Kemp 100 inches, and if the water company only took 300 or 400 inches, that wouldn't take the whole flow of the

(Testimony of C. H. Christensen.)

creek up there, but the demand is greater at times during the day than at other times, and we may have required more than 400 inches; it would depend on what the maximum demand was. The reservoir is full all the time, and the flow into the pipeline may be as high as 1100 inches during the day time or as low as 300 inches during the night time. From 1902 to 1924, the pipeline would carry about 24,000,000 gallons, 1450 to 1500 inches, and that was its carrying capacity before and since 1924, although it has never carried that much.

The COURT: How much water does the city use a day? You said something about 24,000,000 gallons.

A. It has been as high as 18,000,000 gallons during the 24 hours, and at the present time it is five and a half millions.

The COURT: Where do you use the rest?

A. Sir

The COURT: Well, any discharge or waste from your reservoir? How do you regulate it?

A. That regulates itself. There is a volume valve and that opens and closes as the reservoir level lowers or rises.

The COURT: All right. Anything further?
[199]

Mr. WHITLOCK: We desire at this time to offer in evidence a certified copy of the amended complaint in cause No. 1953, being the water adjudication case.

Mr. WILSON: We have no objection.

DEFENDANT'S EXHIBIT 9,

the certified copy of amended complaint above mentioned, so admitted in evidence without objection, is in words and figures as follows, to-wit:

IN THE FOURTH JUDICIAL DISTRICT
COURT.

State of Montana,
County of Missoula.

The Missoula Water Company, a Corporation,
Plaintiff,

vs.

Charles E. Williams, Missoula County, John E. Johnson, Elmer E. Hughes, John White, Harry Mattison, Ollie D. Mattison, B. F. Nesmith, Mary F. Nesmith, Andrew Schilling, Mamie E. Murray, Charles Owens, Harvey Biggs, Henry C. Hollenbeck, Thomas P. Street, William Mattison, R. M. Cobban, John Smith, W. H. Raymond, Wallace P. Smith, J. B. Frazier, E. R. Kilburn, J. W. Connelly, Sebastian Effinger, George A. Duncan, James S. Kemp, Otto Quast, Jacob G. Ambrose, John Adams, E. J. Waitman, W. F. K. Beeskove, Arthur Franklin, F. L. Pelcher, G. E. Van Buren, Missoula Real Estate Association, Peter Federson, W. R. Hamilton, H. E. Day, John Harkness, Theodore LaChambre, A. B. Hammond, Cluff. Vasser, William Neil, John Capp, Mrs. E. J. Clements, C. H. Moss, Joel A. Moss, John Barrett, A. A. Settlemire and Rufus Striker,
Defendants. [200]

Now comes the above named plaintiff, leave of Court having been granted to file its amended complaint, and complains of the above named defendants, and for cause of action, alleges:

I.

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and as such corporation is now doing business in the State of Montana, having filed in the office of the Secretary of the State of Montana, and in the office of the County Clerk of Missoula County, this State, all of the certificates and statements, and having done all things required by Section 1030 of the Civil Code of Montana, to authorize a foreign corporation to do business in this State.

II.

That the purposes for which said corporation was organized, were, among others, the right to acquire, equip, own, maintain, and operate water-works, reservoirs, ditches, flumes, dams, pipes and other facilities for storing, having and disbursing water, for irrigating, power and domestic purposes within the State of Montana; to purchase, or otherwise acquire and appropriate the waters of any stream, lake or water supply, and to conduct the same for sale and distribution.

III.

That the plaintiff under the powers contained in its articles of incorporation has purchased and

become the owner of valuable water rights, and the owner of the use of a large quantity of water appropriated and diverted from Rattlesnake Creek in the County of Missoula, this State, for the purpose of supplying the inhabitants of the City of Missoula and vicinity with pure, fresh water for domestic, agricultural, mechanical and other useful and beneficial purposes, among which are, to protect and secure the lives and safety of the property of the inhabitants of the City of Missoula, and vicinity from fire and conflagrations, all of which are public uses.

IV.

That the defendant, Missoula County, is a municipal corporation organized by the laws of the State of California.

V.

That the defendant, Missoula Real Estate Association, is a corporation duly organized and existing under and by virtue of the laws of the State of Montana.

VI.

That the plaintiff is now and for a long time prior hereto, has been the owner of a franchise granted to its predecessors in interest by the Common Council of the City of Missoula, this State, said City being a municipal corporation duly organized and existing under and by virtue of the laws of Montana; and that under and by virtue of such franchise the plaintiff and its predecessors in interest, have at a heavy expense and by the

expenditures of large sums of money, laid and constructed water mains and pipes throughout the principal portions of the City of Missoula, and for more than twenty-five years last past have conveyed through said water mains and pipes water appropriated and diverted from the said Rattlesnake Creek, as aforesaid, and have during all of said time supplied the City of Missoula and the inhabitants thereof, and vicinity, with water for the public uses, as aforesaid, and that the plaintiff is now supplying the inhabitants of the said City of Missoula and vicinity with water for the aforesaid purposes and intends to continue so to do. [202]

VII.

That the plaintiff in and during the year 1864 by and through its grantors and predecessors in interest, by means of dams, ditches and flumes diverted, appropriated and used the waters of Rattlesnake Creek to the amount of Two thousand (2000) inches, and afterwards, by and through its predecessors in interest, to-wit, in the year 1868, by means of dams, ditches, head-gates and flumes did divert, appropriate and use of the waters of said Rattlesnake Creek to the amount of twelve hundred (1200) inches, and did, by and through its predecessors in interest, by means of dams, ditches and flumes, divert and appropriate of the waters of said creek in the year 1868 one thousand (1000) inches; that said water and the whole thereof was diverted and appropriated from the said Rattlesnake Creek in the County of Missoula, State of

Montana, for mechanical, agricultural, domestic and other useful and beneficial purposes; that said diversion and appropriation made by the plaintiff of the waters of said creek amount in the aggregate to forty-two hundred (4200) inches, measured according to the laws of the State of Montana for the measurement of water; that from the time of the first appropriation of said water in 1864 up to the present time, the said plaintiff and its predecessors in interest have continually used the waters of said creek, and so much thereof as have from time to time been necessary during said time for the purpose for which the same was appropriated, except at such times when the plaintiff or its predecessors in interest were deprived of the use of a portion of said water by the acts of the defendants, or some one or more of the said defendants herein, and that the said water and the whole thereof is, was and will be [203] necessary and required by the said plaintiff for the purpose for which the same was appropriated as hereinabove alleged.

Plaintiff further alleges that it has a contract with the City of Missoula, made with the Common Council thereof, and duly signed by the proper authorities of said City, by the terms of which the plaintiff is required to furnish said City with a sufficient quantity of water for all of the public uses required by the City, principal amongst which is to furnish water to extinguish fires and prevent conflagrations in said City; and under its franchises aforesaid, is required to furnish water to all of the

inhabitants of said City, for domestic and other useful and beneficial purposes whenever required so to do by them, or any of them, and is now, and for many years last past been doing so.

IX.

Plaintiff further alleges that the defendants, and each and every one of them, claim to have made appropriations of water from said Rattlesnake Creek, and claim the right to divert and use said water from said creek, and for a long time past have been, and now are diverting and using water from said creek to which the plaintiff is entitled by virtue and reason of plaintiff's prior right to the same, acquired by prior appropriation thereof, made by the plaintiff's grantors and predecessors in interest as aforesaid.

X.

That all of the appropriations of water claimed to have been made from the said Rattlesnake Creek by the defendants, or any of them, and all and each of their rights to the use thereof, were made and acquired, if at all, subsequently to the time that the plaintiff acquired the right to the use of [204] said water by and through the appropriation thereof made by plaintiff's grantors and predecessors in interest, as aforesaid alleged, of all of which the plaintiff is now the owner.

XI.

That for more than two years last past, the defendants or some of them, have, during the sum-

mer and fall of each year, when the water was low and scarce in said creek, continually diverted large quantities of water from said creek, to the use of which the plaintiff was entitled by reason of the prior appropriation made by the plaintiff's grantors and predecessors in interest as aforesaid, thereby depriving the plaintiff of the use thereof, to its great damage and detriment.

XII.

That the defendants have been requested by the plaintiff, by and through its manager, to cease diverting said water and depriving the plaintiff of the use thereof, and they have often agreed so to do, but disregarding the requests and demands of the plaintiff's manager to cease diverting and molesting the waters of said creek, and depriving the plaintiff of the use thereof, the defendants continue to divert said water from said stream, and continue to deprive the plaintiff of the use thereof, and from the acts of the defendants in disregarding the requests and demands of the plaintiff made as aforesaid, to cease diverting and using said water, and depriving the plaintiff of the use thereof, the plaintiff has reason to believe, and does believe, and therefore alleges the same to be a fact, that the defendants intend to, and by their acts as aforesaid, threaten to continue to divert and use said water, to the use of which the plaintiff has a prior right, and deprive the plaintiff of the necessary use thereof, [205] to his great damage and irreparable injury.

XIII.

The plaintiff further alleges that the defendants, Charles E. Williams, John Barett, John Capp, Mrs. E. J. Clements, Otto Quast, William Neil, Jacob G. Ambrose and A. A. Settlemyre are now wrongfully and unlawfully diverting and using about one thousand (1000) inches of the water of said Rattlesnake Creek, to the use of which the plaintiff is now entitled by reason of prior appropriation as hereinbefore alleged, and unless enjoined and restrained by the Court, will continue to divert and use said water and deprive the plaintiff of the use thereof.

That the plaintiff by its manager and duly authorized agent has repeatedly requested and demanded of the defendants last above named, to cease using and diverting said water and the said defendants have repeatedly promised so to do, but have failed and neglected to do so, and still continue to divert and use said water to the great damage and injury of the plaintiff. That the manager and agent of plaintiff has on several occasions turned the water away from the ditches of the last named defendants, and turned it into the ditches of the plaintiff, and the defendants last above named have as repeatedly turned it into their ditches again, and deprived the plaintiff of the use thereof.

Plaintiff alleges that notwithstanding the fact that the said last named defendants have promised the plaintiff that they would refrain from using and diverting said water, and depriving the plaintiff of the use thereof, they still continue to divert and use it, and deprive the plaintiff of the use thereof;

and plaintiff alleges, that it has reason to believe and does believe, that the defendants last above named [206] intend to continue to use and divert said water, and that by their acts aforesaid, threaten, and unless restrained by and order of this Court will continue to use and divert said water, and deprive the plaintiff of the necessary use thereof, to its great damage and irreparable injury.

XIV.

That at the present time, and for one month last past, there is, and has been a very low stage of water in said Rattlesnake Creek, and at the present time the plaintiff has not the necessary quantity of water in its mains and water pipe to meet the necessary demands made upon plaintiff for water by the City of Missoula, and the inhabitants thereof, and the reason that the plaintiff does not now have a sufficient quantity of water to supply the demands aforesaid is, that the defendants last herein named, are now diverting and using said water to which the plaintiff is entitled, as aforesaid; that if said defendants last named, were not diverting and using said water to the use of which the plaintiff is entitled, the plaintiff would have sufficient to meet its immediate demands and wants.

XV.

Plaintiff further alleges that owing to the long dry period of weather there is much apprehended

danger of fires occurring in the City of Missoula, and that should a fire occur in said City at the present time, while the buildings are in their present dry and inflammable condition, it would require all of the water that plaintiff's mains and water pipes would carry to successfully fight said fire and to prevent its spreading and destroying much property, and that the supply of water that plaintiff is now able to obtain would be wholly in- [207] sufficient to subdue such fire or fires and properly protect the property of the inhabitants of said City.

That should such fire or fires occur it would be the duty of the plaintiff under its contract with said City as aforesaid, to furnish to its full capacity water for the purposes aforesaid, and in its failing so to do might make it liable to heavy damages.

Plaintiff further alleges that while the defendants last named herein are not insolvent, they would be unable to respond in damages in an equal amount to the damages which the plaintiff would be liable to sustain, should a destructive fire occur in said City at the present time and while the plaintiff is deprived of a necessary supply of water to fight and control such fire and prevent the destruction of property, by the acts of said defendants in using and diverting the same, and depriving the plaintiff of the use thereof, and that if said defendants were able to respond in damages sufficient to reimburse this plaintiff for damages that might be secured against it as aforesaid, to recover

the same, plaintiff would be compelled to institute and prosecute a multiplicity of suits and actions.

XVI.

Plaintiff further alleges that unless the defendants last herein named are immediately restrained and enjoined from diverting and using the water of said Rattlesnake Creek to the use of **which** the plaintiff is entitled, the plaintiff will suffer great and irreparable injury. That the present supply of water that the plaintiff can now procure for the purpose aforesaid, is so limited, caused by the acts of the said defendants as aforesaid, and for the reason stated as aforesaid, [208] the danger from fire is so imminent, that there is not sufficient time to give defendants notice to show cause why said temporary injunction should not be granted.

WHEREFORE, plaintiff prays judgment:

1st. That the plaintiff be adjudged and decreed the prior right over each and every one of said defendants, to the perpetual use of forty-two hundred (4200) inches of the water of Rattlesnake Creek.

2nd. That each and every one of the defendants named herein, be required to appear and answer, and establish by proof the extent of their interests in the waters of said Rattlesnake Creek, if any they have.

3rd. That upon a final hearing of this action that the Court render a decree determining the rights of all the parties to this action to the waters

of said Rattlesnake Creek, as the same may be made to appear.

4th. That a temporary injunction be immediately issued enjoining and restraining the defendants, Charles E. Williams, John Barett, John Capp, Otto Quast, Mrs. E. J. Clements, William Neil, Jacob G. Ambrose and A. A. Settlemire, and each and every one of them, and each and every one of their agents, servants, attorneys or employees, from diverting or using any of the water of said Rattlesnake Creek, and depriving the plaintiff of the use thereof, until the final hearing of this cause, or until the further order of the Judge of the above entitled Court.

5th. That the defendants, and each and every one of them, be perpetually enjoined and restrained from in anywise molesting or interfering with the water rights of the plaintiff after the same have been determined by this Court. [209]

6th. That the plaintiff be decreed the right to take from said Rattlesnake Creek, at one place, to be by it selected, all of the water of said creek, to which the Court shall find the plaintiff entitled.

7th. Plaintiff prays judgment for costs herein expended, and for all general and special relief.

WOODY & WOODY &
MARSHALL & STIFF

Attorneys for Plaintiffs.

State of Montana,
County of Missoula.—ss.

T. T. McLeod, being first duly sworn upon his oath, deposes and says: that the plaintiff herein

is a corporation, and that he is an officer thereof, to-wit, manager; that he has read the foregoing complaint, and knows the contents thereof, and that the matters therein stated are true to his best knowledge, information and belief, as such manager, except as to the matters therein stated as to the diverting and using of said water by the said defendants, and depriving the plaintiff of the use thereof, and of the promises and acts of the said defendants, and the insufficient supply of water now had by the plaintiff, plaintiff's urgent need of the same, and imminent danger from fires if plaintiff is deprived of said water, the damage the plaintiff is liable to incur if the parties are not enjoined as prayed for, and all of these facts he knows of his own personal knowledge.

T. T. McLEOD

Subscribed and sworn to before me this the 26 day of October, 1901.

HENRY C. STIFF [210]

[Seal]

Notary Public in and for
Missoula County, Montana.

Service, by copy, of the foregoing amended complaint is hereby accepted, this the 26 day of October, 1901.

DIXON & MURPHY

of Attorneys for Defendants.

(Filed: Oct. 26, 1901.)

(Duly certified by the clerk of said court to be a true copy of said amended complaint.)

Mr. WHITLOCK: And I also offer in evidence answer to the amended complaint of Charles E. Williams and Jennie Williams and others.

Mr. WILSON: We have no objection.

DEFENDANT'S EXHIBIT 10,

the answer to amended complaint above mentioned, so admitted in evidence without objection, is in words and figures as follows, to-wit:

[Title of Court and Cause as in Exhibit 9, supra.]

Now come the above named defendants, Charles E. Williams and Jennie Williams, Otto Quast, and Jacob G. Ambrose, and for their separate answer to the amended complaint herein:

DENY each and every allegation therein contained that is not specifically admitted or denied herein-after.

1. With reference to the allegations contained in paragraphs one (1), two (2) and three (3) of said amended complaint, they deny any knowledge or information thereof sufficient to form a belief.

2. Admit the allegations contained in paragraphs four (4) and five (5) of said amended complaint. [211]

3. With reference to the allegation that the plaintiff is now and for a long time has been the owner of a franchise granted to its predecessors in interest by the common council of the City of Missoula, and the allegation that under and by virtue of such franchise the plaintiff and its prede-

cessors in interest have, at a heavy expense and by the expenditure of large sums of money, laid and constructed water mains and pipes throughout the principal portions of the City of Missoula, these defendants deny any knowledge or information sufficient to form a belief, and therefore deny the same.

4. Admit that plaintiff and its predecessors in interest have diverted and conveyed water from Rattlesnake Creek and supplied the City of Missoula and the inhabitants thereof with water, and is now supplying water to the inhabitants of said City, but deny any knowledge or information sufficient to form a belief as to the allegation that said plaintiff and its predecessors in interest have been diverting, conveying and supplying said water for more than twenty-five years, and therefore deny the same.

5. With reference to the allegations contained in paragraph seven (7) of said amended complaint these defendants deny any knowledge or information sufficient to form a belief, and therefore deny the same, (except that these defendants admit that said plaintiff and its predecessors in interest have diverted and used certain of the waters of said creek.)

6. Admit that these defendants and their co-defendants claim the right to divert and use the waters of Rattlesnake Creek, and for a long time past have been, and now are, diverting and using said waters, but deny that these defendants are now, or have been, diverting or using any water

from said [212] creek to which the plaintiff is entitled as alleged in paragraph nine (9) of said amended complaint, or otherwise, or at all.

7. With reference to the allegation contained in paragraph ten (10) of said amended complaint, these defendants deny any knowledge or information sufficient to form a belief, and therefore deny the same.

8. Deny that these defendants have been, or now are diverting, or will, unless enjoined or restrained from so doing, continue to divert any of the waters of said creek to the use of which plaintiff is entitled by reason of prior appropriation or otherwise, but allege that any diversion of said waters which these defendants are now making, have made, or will in the future make, is by virtue of an appropriation and right as hereinafter stated.

And for further answer to plaintiff's complaint these defendants allege:

1. That the plaintiff asserts and claims a right to the use of certain waters of said creek which have been, and now are being diverted through a certain flume connected with said Rattlesnake Creek a short distance from the mouth of said creek; that the diversion so made is one of the diversions referred to in the complaint herein; that said water so diverted through said flume was for the purpose of furnishing power for a grist mill located on the bank of Hell Gate river, and was used for such purpose for a number of years; that about 10 years ago the use of said water for said purpose ceased

and since that time no use has been made of said water so diverted and through said flume, except for the purpose of furnishing power for certain machinery used in sawing, planing, [213] and otherwise preparing lumber; that for the operation of said machinery the use of only 100 inches of water has been during said time, or is now required, and the plaintiff and its predecessors in interest intend to abandon and have abandoned any right acquired to the use of the waters through said flume, except to the amount of 100 inches.

And these defendants for their further answer, and for a cross-complaint and counter-claim, and for the purpose of stating and setting forth their right to the use of the waters of Rattlesnake Creek, allege:

1. That the defendant, Charles E. Williams, is the owner, in possession, and entitled to the possession of certain lands situated in Missoula County, State of Montana, adjacent to and in the vicinity of the Rattlesnake Creek, and described as follows:

NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ and East half of NW $\frac{1}{4}$ of Section 11 in Township 13 N of Range 19 West, Montana Meridian.

2. That the defendant, Jennie Williams, is the owner, in possession and entitled to the possession of certain lands situated in Missoula County, State of Montana, adjacent to and in the vicinity of the Rattlesnake Creek, and described as follows:

The Northeast quarter of Section 11 Township 13 N of Range 19 West of Montana principal Meridian.

3. That the defendant, Otto Quast, is the owner, in possession and entitled to the possession of certain lands situated in Missoula County, State of Montana, adjacent to and in the vicinity of the Rattlesnake Creek, and described as follows:

SE $\frac{1}{4}$ SE $\frac{1}{4}$; and SW $\frac{1}{4}$ SE $\frac{1}{4}$ less 10 acres; 5 acres in NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 11, and S $\frac{1}{2}$ of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 2 Township 13 N of [214] range 19 West.

4. That the defendant, Jacob G. Ambrose, is the owner, in possession and entitled to the possession of certain lands situated in Missoula County, State of Montana, adjacent to and in the vicinity of the Rattlesnake Creek, and described as follows:

SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 11 Township 13 N of Range 19 W. Montana Meridian according to the United States Government survey thereof.

That the defendants H. C. Chattin, John W. Chattin, Charles W. Chattin and Benjamin F. Chattin are the joint owners, in the possession and entitled to the possession of certain lands situated in Missoula County, State of Montana, adjacent to and in the vicinity of Rattlesnake Creek, described as follows: The North three-fourths of the east half of the North-west quarter of the South-east quarter of section eleven township thirteen North range nineteen west, containing about fifteen acres.

That the defendant John A. Kapp is in the possession and entitled to the possession of certain lands situated in Missoula County, State of Montana, adjacent to and in the vicinity of Rattlesnake

Creek described as follows: The South one fourth of the west half of NW $\frac{1}{4}$ of SE of sec. 11 tp 13 N. R. 19 West.

That all of said lands are valuable for agricultural and grazing purposes only, and in order to make the same productive and useful for such purposes irrigation by artificial means is required.

That said defendants in this answer specially named, in the month of April 1st, in the year of 1872, and by their [215] predecessors, who were then the owners and in possession of said land, constructed a ditch with a capacity of 450 inches, connecting with said Rattlensake Creek. That said ditch diverted and conveyed to and upon the above described lands 450 inches of the waters of said Creek, for the purpose of irrigating said lands, and for domestic purposes, thereby appropriating 450 inches of said water.

That the construction of said ditch was commenced on the First day of April in said year, and the work necessary for the completion thereof was prosecuted diligently.

That these defendants, and their grantors and predecessors in interest, have, at all times since said diversion and appropriation, used, enjoyed and possessed as tenants in common, 450 inches of the waters of said Creek, for the purpose of irrigating said lands and for domestic purposes.

That the said waters and the whole thereof so diverted and appropriated as aforesaid, is necessary

and indispensable in and about the irrigation and cultivation of said lands, and in the production of and growing hay, grain, vegetables and grass thereon.

And for further answer to plaintiff's complaint, these defendants allege:

1. That these defendants and their predecessors and grantors in interest have been in the open, notorious, exclusive, continuous and adverse possession, and have had the open, notorious, exclusive, continuous and adverse use and enjoyment of the said 450 inches of the waters of said Creek, for irrigating purposes, during the irrigation season of each and every year since the month of April in the year of 1872, and have during all of said time claimed the right to use and enjoy [216] said water as against said plaintiff, and all others whomsoever.

WHEREFORE these defendants pray that they may be adjudged and decreed the right to use 450 inches of the waters of said Rattlesnake Creek, and of date the 1st day of April in the year 1872, and for their costs and *imbursements* incurred herein, and for such other and further relief as to the Court may seem just and equitable.

CLAYBERG & GUNN

DIXON & MURPHY

W. P. SMITH

Attorneys for Answering Defendants.

State of Montana,
County of Missoula.—ss.

Charles E. Williams, being first duly sworn on his oath says:

That he is one of the defendants named in the foregoing entitled action; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true, except as to those things therein stated on information and belief, and as to those things he believes them to be true.

CHAS. E. WILLIAMS

Subscribed and sworn to before me this 10th day of January, 1902.

W. L. MURPHY

Notary Public in and for Missoula
County, Montana.

[Filed: Jan. 10, 1902.]

[Duly certified by the clerk of said court to be a true copy [217] of said answer.]

Mr. WHITLOCK: Counsel have agreed and the record may show that the answers of all of the other defendants in that case are the same as the one I last introduced except as to the description of the land and the description of the water rights claimed.

Mr. WILSON: And the names of the parties. We agree to that.

Mr. WHITLOCK: If your Honor please, I now offer in evidence a certified copy of the first recorded notice of appropriation of the old Mill right.

Mr. WILSON: That is objected to upon the ground that it is—this subject was entirely covered and adjudicated by the decree in 1953, and may not now be impeached or contradicted or collaterally attacked.

Mr. WHITLOCK: It is offered for this reason: it is followed by two other exhibits similar in character which show the history of that particular right and show an intent or declaration of change of place of use of the old Mill right by the appropriators.

The COURT: It may go in for whatever consideration it may be entitled to. Objection overruled.

Mr. WILSON: Exception.

DEFENDANT'S EXHIBIT 11,
the notice of appropriation above mentioned, so admitted in evidence over the objection of the plaintiffs, is in words and [218] figures as follows, to-wit:

WATER RIGHT

Worden & Company, Claimants.
TO ALL WHOM THESE PRESENTS MAY
CONCERN:

KNOW YE, that we, C. P. Higgins and F. L. Worden, doing business in the town of Missoula

Mills, Montana Territory, under the name and firm style of Worden & Co., claim and have appropriated for mill purposes, all the water of Rattlesnake Creek, said water being conveyed by means—dams, ditches and flumes, from a point on said Rattlesnake Creek, about one-third of a mile above the mouth of the same, and where their dam is now located, to the flouring and saw mills, located in the town of Missoula Mills, Missoula County, Montana Territory, said water being claimed and appropriated for the above named purposes to the exclusion of all other claimants.

WITNESS our hands this 16th day of November, A. D. 1868.

C. P. HIGGINS

F. L. WORDEN.

Filed Nov. 16th, 1868, at 2 o'clock P. M.

F. H. WOODY.

County Recorder, Missoula County, M. T.

[Duly certified by the county clerk and recorder of Missoula County, Montana, to be a true copy of said water right, as the same appears on record in his office.]

Mr. WHITLOCK: I now offer Defendant's Exhibit 12, declaration of appropriation of water of Frank L. Worden and Christopher P. Higgins to the Mill right in 1885, and showing the change of point of diversion of that right. [219]

Mr. WILSON: It is objected to upon the ground that it is incompetent, irrelevant and immaterial,

and an attempt to modify, impeach and collaterally attack the decree in cause No. 1953.

The COURT: Of course, it can't do that. Admitted over the objection.

Mr. WILSON: Exception.

DEFENDANT'S EXHIBIT 12,

so admitted in evidence over the objection of the plaintiffs, is in words and figures as follows, to-wit:

B—126.

DECLARATION OF APPROPRIATION AND CLAIM TO WATER.

We, Frank L. Worden and Christopher P. Higgins, partners, under the firm name and style of Worden & Co., citizens of the United States, and residents of the town of Missoula, County of Missoula, Montana Territory, do hereby give notice to all persons concerned, that we have heretofore claimed and appropriated all the waters of Rattlesnake Creek in said Missoula County, Montana Territory as follows to-wit:—First, all the waters of said Rattlesnake Creek in Missoula County, Montana Territory. The said waters was and is conveyed by means of dams, flumes and ditches. 2nd, that the purposes for which said water is and was claimed and appropriated for Milling and power purposes, etc., to furnish a water power to run the grist and flouring mill of the above named Worden & Co., situated in the town of Missoula Mills, Montana Territory. That the means of diversion of said

water is by putting in a temporary dam in the main creek when the water is at a low stage, which turns the water into a branch of said stream or main Creek, then by a headgate and flume six (6) feet wide, four (4) feet deep, [220] twenty-four (24) feet long, leading into a ditch of about same dimensions, in width and about one half of a mile long. The capacity of said ditch and flume is about twenty five hundred (2500) inches miners measurement, and carries all the water that flows in said Rattlesnake Creek during the months of September, October, November, December, January and February, when not diverted by ice or other obstructions from said flume and ditch. A record of the appropriation of all of said water in said Creek was made by the said Worden & Co. on the 16th day of November, A. D. 1868, and is recorded in Book (A) of record page 29, records of water rights, in the Records Office for Missoula County, Montana Territory. The name of the stream from which the diversion of said water is made is, as above stated, Rattlesnake Creek. The point where said water is diverted from said stream is about one third of a mile above the mouth of said Creek, where it empties into the Hellgate River. That in the year 1868, there being at certain portions or months of the year when said creek is at a higher stage of water, a surplus in said Creek, over and above the water diverted for said Milling purposes, as hereinbefore described, and when the said waters were not so required for Milling purposes, under the said appropriation, Christopher P. Higgins di-

verted a portion of said surplus, at such times as there should be a surplus, for irrigating, mechanical, and other useful purposes, and recorded said notice of appropriation on the 16th day of November, 1868, which is recorded in Book A page 30, of water rights and locations, in the County Records Office, Missoula County, Montana Territory. The undersigned do hereby further give notice that they claim and have heretofore claimed from the surplus water in said Creek, [221] when there shall be a surplus in said Creek, over and above the waters hereinbefore mentioned and described, as diverted and appropriated, one hundred inches, or so much of said water as shall be required and sufficient for the purposes hereinafter mentioned and described. That the purposes for which said last above mentioned diversions claim and appropriation is claimed, is for the purpose of furnishing the Missoula Water Works with a sufficient supply of water to supply the town of Missoula and the citizens thereof with water for irrigation, household and domestic purposes. That the date of the appropriation of said last above mentioned water is and was in the year 1871. That the means of diversion of said last above mentioned water is by putting a dam in the branch of said Creek, to which the water is diverted by the ditch of C. P. Higgins, heretofore mentioned, then a flume or box, about 18 x 24 inches, with two screens at the head with a head gate in said flume, about ten inches square, with a head of water over said head gate of about eighteen

inches, supplying the boxes, reservoirs, and pipes of the Missoula Water Works, with one hundred inches or more of water, miners measurement. That in the years 1881, 1882, 1883, 1884, new flumes, boxes, reservoirs, iron pipes, and a permanent head gate in the main Creek was put in, in order *to a* more permanent and sufficient supply of water for said water works and to said Town. The date of the appropriation of said last mentioned water was in the year 1871, and the said Frank L. Worden and Christopher P. Higgins, partners, under the firm name and style of Worden & Co., are and were the appropriators and are the present owners of all of said water, as above mentioned. The name of the stream from which said water is diverted is Rattlesnake Creek. [222] That the point where said water last above mentioned is diverted from said Creek is at the same point where the water mentioned as having been appropriated by said C. P. Higgins is diverted, and is about one and one half (1½) miles above the mouth of said creek, on its West bank, in Missoula County, Montana Territory. That this declaration and claim of all said water as above mentioned is made to comply with the Act of the Legislative Assembly of the Territory of Montana, relative to water rights, approved March 12, 1885, and is made without waiving any rights by virtue of prior claims and appropriations.

WITNESS our hands this 20th day of June, A. D. 1885.

FRANK L. WORDEN.

CHRISTOPHER P. HIGGINS.

Territory of Montana,
County of Missoula.—ss.

Frank L. Worden and Christopher P. Higgins, being duly sworn on their oaths, deposes and says: That they are members of the firm of Worden & Co., the persons mentioned in the foregoing notice of prior appropriation and claim of the waters therein mentioned; that he has heard the same read and know the contents thereof and that the said notice is true of their own knowledge.

FRANK L. WORDEN.

CHRISTOPHER P. HIGGINS.

Subscribed and sworn to before me this 20th day of June A. D. 1885.

[Notarial Seal] THOMAS C. MARSHALL,
Notary Public.

Filed June 20, 1885, at 4 P. M. [223]

(Duly certified by the county clerk and recorder of Missoula County, Montana, to be a true copy of said declaration of appropriation, as the same appears on record in his office.)

Mr. WHITLOCK: I now offer as the Defendant's Exhibit 13 a similar copy notice of water right by the—relating to the same right, showing a change of diversion at a later date, this one bearing the date 1887.

Mr. WILSON: The same objection as was made to Exhibit 12.

The COURT: A like ruling.

Mr. WILSON: Exception.

DEFENDANT'S EXHIBIT 13,

so admitted in evidence over the objection of the plaintiffs, is in words and figures as follows, to-wit:

NOTICE OF WATER RIGHT

B—273

Territory of Montana,
County of Missoula—ss.

To all whom these presents may concern:

Know ye, that the undersigned, a corporation organized and existing under the laws of Montana Territory, do hereby publish and declare, as a legal notice to all the world, that we, have a legal right to the use, possession and control of and claim two thousand (2000) inches of the waters of Rattlesnake Creek in said County and Territory, for milling, mechanical, and other useful purposes, including the supplying of the town of Missoula with water.

That we have diverted the said water from the main chan- [224] nel of Rattlesnake Creek, at a point upon its West bank, on the land claimed by W. A. Clark, near the North line of the same, and about $\frac{1}{2}$ mile above the residence of said W. A. Clark, by means of a headgate, which said headgate is sixty (60) inches wide by forty-eight (48) inches deep in size, and carries 2000 inches of the water aforesaid into a West branch of Rattlesnake Creek. This point of diversion is further marked and designated as being a little East of a large pine tree about 4 feet in diameter, standing on the bluff on the West side of said Creek, and marked and blazed. That at a

point about six hundred feet below and south of this point of diversion we take and divert the water from the said West branch of Rattlesnake Creek by means of a dam and a headgate which said headgate is sixty (60) inches wide by forty-eight inches deep in size, and which carries and conducts said 2000 inches of water into a ditch made of boxes, eighteen inches by twenty-four inches in size, covered with earth, which said covered ditch runs in a southerly direction about 2-6/10 miles to a reservoir upon the hill North of Missoula, thence to any requisite point of discharge. That this notice of location and claim is intended as an amendment to two certain water rights made by Frank L. Worden and Christopher P. Higgins one of which bears date of November 16th, 1868, and is recorded in the office of the County Recorder of Missoula County in Book A. of water rights page 29, the other water right being made by the same parties on June 20, 1885, and recorded in the office of the County Recorder of Missoula County in Book B. of Water Rights, on pages 126, 127, 128, 129 and 130, and is a change of the point of diversion of the water claimed under said notices, in accordance with the provisions of Section 3 [225] of an Act relative to Water Rights, passed by the Fourteenth Legislative Assembly of Montana Territory and approved March 12, 1885. Reference is hereby made to said records for a further description. That the undersigned corporation is the legal owner of said water and water right by means of purchase.

That we also claim said ditch and the right of way thereof, and for the water by it conveyed, or to be conveyed, from said point of appropriation to said point of final discharge, and also the right of location upon any lands of any dams, flumes or reservoirs, constructed or to be constructed, by us in appropriating and using said water. That we also claim the right to keep in repair and enlarge said means of water appropriation at any time, and the right to dispose of said water, ditch, right, or said appurtenances, in part or whole at any time.

CLAIMING THE SAME ALL AND SINGULAR under any and all laws, National and Territorial, relating to water rights, and specifically under Sections 271, and 272, 731 to 735, inclusive, and 738 and 741, General Laws of Montana, Revised Statutes of 1879 or as amended, and particularly under an act of the Fourteenth Legislative Assembly of Montana Territory, approved March 12, 1885. Together with all and singular the hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

Signed for the Corporation by its President at Missoula, Montana Territory, this 26th day of July, A. D. 1887.

MISSOULA WATER WORKS AND
MILLING COMPANY

By C. P. Higgins, President.

Territory of Montana,
County of Missoula.—ss. [226]

C. P. Higgins being duly sworn deposes and says that he is the President of the Missoula Water Works and Milling Company, the corporation named as the locator and claimant, of the within named and described water right; that he knows the contents thereof, and that the matters and things therein stated are true of his own knowledge.

C. P. HIGGINS

Subscribed and sworn to before me this 27th day of July, 1887.

[Seal]

ALVIN LENT,
Notary Public.

I certify that I received this instrument for record on the 27th day of July, 1887, at 4:30 o'clock P. M.

ALVIN LENT,
County Recorder

Filed: July 27th, 1887, at 4:30 P. M.

PETER FEDDERSON,

a witness called in behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Pope:

The WITNESS: My name is Peter Fedderson; I reside in California, but formerly resided in Missoula County; I came here in 1879 and I left

(Testimony of Peter Fedderson.)

in 1910. During that period of time I owned and operated a ranch located on Rattlesnake Creek. I was a party to the action which has been referred to here as the suit brought by the Missoula Water Company against Williams and others for the purpose of adjudicating the rights in Rattlesnake Creek; I was a defendant in that action. I re- [227] call that that suit was commenced in the neighborhood of 1902, but I thought it was sooner.

With reference to the commencement of that suit, I can state where the supply of water for supplying the city of Missoula and its inhabitants was taken out; it was about a quarter of a mile—probably not that much—I should say an eighth of a mile below the barns—below my barn. Referring to the map, Exhibit 6, and to the point where it is marked “water works,” that is approximately the location of the head of the ditch or flume for supplying the city of Missoula at that time. At that time I don’t think there was any other point or place from which the city of Missoula or the water company furnishing the city of Missoula with water was obtaining a supply of water for that purpose.

I am familiar, of course, with the old Mill ditch. Prior to the commencement of the suit there was not any more appreciable use being made of the Mill ditch than what I heard here today telling—told by people that used it for carpenter shop, Mr. Newton and others. I knew of it being used for some time to supply Mr. Newton with power. As to the Higgins ditch, there was not a great deal of

(Testimony of Peter Fedderson.)

use being made of that prior to the time the suit was commenced. I couldn't fix a date which was the last date when the old flour mill was used, but I think it was—I had a lot of barley ground and dried at the time the Missoula brewery burned down, and while they was trying to put out the fire they had a lot of barley that was lying in vats. I think that was in 1891 or '2. As to whether there was any use ever made of the flour mill after that date, well, there may have been some time a year or so. They tried to grind some flour or oatmeal or something of that [228] kind, but not to a great extent.

As to what occurred in regard to the old flume that I have described as originating approximately an eighth of a mile below my barn prior to the time the point of diversion for the city water supply was put upstream, and what was the occasion for moving the headgate upstream, well, for years there they have tried to do away with the filth of the barnyard. There was 100 or 125 head of cattle there, and in the spring of the year when the snow went off it naturally made a lot of slush and stuff and it run down in that channel where they took the water out into the flume that diverted the water, and that was several years before—that condition existed several years before they moved the diversion of that water. That flume was a box flume, covered.

I think it was in '92 that the place of diversion of the city water supply was moved upstream—1902.

(Testimony of Peter Fedderson.)

At that time a pipeline was laid under the ground from the new point of diversion; that crossed my land. That ran along the slope of the hills above the house. I don't know if the line of that pipeline was readily noticed by anyone in the valley; it was buried but it could be seen if they had an idea of looking and wanted to see it; it was easy to be seen.

I was myself irrigating my land there at the time that the suit was brought; and also at the time that the point of diversion was moved upstream to the present location I was irrigating and farming. My ditch took out of the stream right below the present dam—right about the length of this room. I don't think that I noticed any diminution of the supply available for irrigation after the dam was put up there compared to the supply available before that. [229]

Q. What would you say about the development of irrigation in the Rattlesnake valley as to whether up until the year 1887 there was any considerable amount of irrigation and farming by irrigation in that valley?

Mr. WILSON: That is objected to upon the ground that the rights for irrigation or otherwise of the waters of Rattlesnake Creek have been fixed by the decree in cause No. 1953, and cannot be impeached or collaterally attacked.

The COURT: Well, that is probably true as to the extent of the rights. Perhaps it is not very

(Testimony of Peter Fedderson.)

material. If not material or entitled to consideration the Court will give it none. Overruled.

Mr. WILSON: Exception.

A. We used—what did you mean?

Q. The question was how extensive was irrigation in the Rattlesnake valley up to 1887?

A. Very little.

The WITNESS: I think it was in 1894 or '5 that considerable irrigation commenced there after that. Some subdivisions—a man that came in there, named Cobban, and others came in there and laid out subdivisions and acquired water rights.

Q. Now, at the time that the suit was started—I mean the suit in which you were a defendant—did you know at that time of any intended change in the point of diversion of the water works there?

Mr. WILSON: Just a moment. That is objected to upon the ground that it is incompetent, irrelevant and immaterial and self-serving and hearsay—[230] not a fact in issue in this case.

The COURT: It may be entitled to no consideration. The Court will allow him to speak, and if not, the Court will ignore it.

Mr. WILSON: Exception.

A. It was told me they did.

Mr. WILSON: We move to strike the answer out as hearsay.

The COURT: Overruled.

Mr. WILSON: Exception.

(Testimony of Peter Fedderson.)

CROSS EXAMINATION by Mr. Mulroney:

The WITNESS: I sold out to the water company in 1910; that is, I transferred my place to the water company, and also the water rights. I don't know as to the date of 1910; I think it was a little sooner. I think that the change from the lower place to the upper wasn't made until June of 1902. I had heard that they proposed to make a change prior to that time. They hadn't, up to the 13th of August, 1901, which was the date of the filing of the complaint in suit 1953, to which I was a party, made the change at all. I don't think they had done anything at all to change the point from the old place to the new.

Witness Excused.

J. M. PRICE,

a witness called in behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

The WITNESS: My name is J. M. Price; I reside at Los Angeles, California, but was formerly a resident of this [231] county. In the year 1906, to which my attention is directed, I had something to do with Rattlesnake Creek; I was water commissioner. I am not positive what period of time during that year my duties in that capacity covered, but I think I was on there about 80 days. At that

(Testimony of J. M. Price.)

time I measured out and delivered water to the company which was then supplying the city of Missoula with its water supply.

I am familiar with the present point of diversion of the supply for the city of Missoula. The point of diversion at that time was the same as it is at present. In 1906 I delivered to the water company supplying the city of Missoula the supply which it required for that purpose from the dam where it is being delivered at the present time. I did not deliver to that company any water at the head of the Mill ditch. I had nothing whatsoever to do with the old Mill ditch at that time.

CROSS EXAMINATION by Mr. Mulroney:

The WITNESS: Handed a report made by me in that year as the water commissioner, being file number 68 in cause No. 1953, the signature which is a part of that report is my own. I couldn't tell you offhand to what ditch I referred as the Hammond ditch, or what ditch is the Hammond ditch. I couldn't say for sure without looking at the decree whether it was the Mill ditch. Doesn't it mention it in the decree. I think that Hammond did not own the Mill ditch. It originally belonged to Worden and Higgins; Hammond may have bought it afterward; I don't think he did.

I also made a charge of the distribution of water into the Higgins ditch, which counsel sees there. That was in 1906. [232] Frankly, I can't recall what this other one is here, the Hammond ditch.

(Testimony of J. M. Price.)

I refer to the Hollenbeck, the Quast, the Effinger, the Williams; I know about those ditches; they are the same. The Kemp, the Cobban, the Higgins, the Hamilton-Day ditch, Fedderson, Fredline, the water company—we understand about all of those but the Hammond ditch. I presume that it was the Mill ditch, but I couldn't say because I don't know.

REDIRECT EXAMINATION by Mr. Pope:

The WITNESS: I am familiar, of course, with the ditch which leads down to what we call the Hughes gardens and which is shown on the map as the Fredline ditch. My attention being called to that ditch and my recollection being refreshed, I think it is possibly correct that I know what the Hammond ditch was. I remember now that was known as the Hammond ditch; I think that is correct. I think it is correct that it is the one that is called the Fredline ditch.

Q. Your recollection is, Mr. Price, that you had nothing whatsoever to do with the Mill ditch?

Mr. MULRONEY: That is objected to as leading.

The COURT: Well, it is, but he has already said, and it is an effort to reaffirm it. The objection is sustained.

Witness Excused.

G. J. HAGENS,

a witness called in behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

The WITNESS: My name is G. J. Hagens; I reside at Ham- [233] ilton, Montana. My business is that of civil engineer. The experience that I have had in engineering as the same applies to water rights is irrigation for about the last 15 years. I have a connection with an irrigation system at the present time—with the Bitter Root irrigation system; I have been connected with that system for 14 years. That system has a length of 72 miles and irrigates about 20,000 acres.

I am familiar with the creek known as Rattlesnake Creek. At the request of counsel for the defendant I have made an examination of that creek; I have gone along the creek from the location of the dam to the mouth of the stream.

Q. And I will ask you if you were able to determine from your examination of the stream and from your experience in that kind of work and in irrigation—did you determine whether or not there were any additions to the flow of this stream from the point of the defendant's dam down stream?

Mr. WILSON: We object to that as not a subject upon which an opinion may be expressed, and it is not any fact involved—

The COURT: He is not asking for an opinion. He has asked him if he was able to determine

(Testimony of G. J. Hagens.)

whether there were any accretions to the stream below the dam. Overruled.

Mr. WILSON: Exception.

A. Yes, I was able.

The WITNESS: I say that there are not any such accretions. I made a sufficiently thorough examination to satisfy myself on that point.

Q. Now, assuming, Mr. Hagens, having in mind that particular stream and having in mind the place where it reaches Pine [234] Street, which is the approximate location of the old Mill ditch—assuming now that you were advised that water was observed and measured in that stream at that point in an amount of 200 or in excess of 200 inches at a time when stretches of the stream above that point and between that point and the dam of the defendant were approximately dry, if not altogether so, what, from your experience and observation of the stream, would you say is the explanation of the presence of water there?

Mr. WILSON: That is objected to upon the ground that it is not a subject upon which an opinion may be expressed, and not calling for any fact involved in this case.

The COURT: I think that is a matter of opinion about which you may argue and that is about all. I can't see how opinions can help you any.

Mr. WHITLOCK: Well, I think certainly the action of water and what is to be expected of it is the proper subject of expert opinion.

(Testimony of G. J. Hagens.)

The COURT: Well, here is, you say, 200 inches of water at the head of the Mill ditch?

Mr. WHITLOCK: Yes sir.

The COURT: And how far above is that dam?

Mr. WHITLOCK: Something over two miles—three miles.

The COURT: And below it it is dry, you say. Why, it is inescapable. You don't need any witnesses to tell me that that water came in from some place below there—rose in the bed.

Mr. WHITLOCK: Well, it is our idea that it would not come from elsewhere, and I think the testimony [235] if permitted will bear us out.

The COURT: If the stream was dry below there, that this water seeped in below and rose in the bed is inescapable. I would not take the word of any witness otherwise.

(The objection was argued by counsel.)

The COURT: That is a mere guess. As I say, it may be argued, but the opinion of one witness is not better than another. Objection sustained.

Mr. WHITLOCK: May I state an oral offer of proof?

The COURT: You may.

Mr. WHITLOCK: The defendant offers to prove by the witness on the stand that if permitted to answer he would say in answer to the question asked that the water appearing at that point is in fact creek water which has passed over the dam and which goes into the bed of the stream and arises at the points along below.

(Testimony of G. J. Hagens.)

Mr. WILSON: The same objection to the offer.

The COURT: Sustained. If it went over the dam there would be witnesses to the fact. It would not require an expert.

Mr. WHITLOCK: Exception.

Q. Mr. Hagens, from your examination of that stream and your knowledge and experience in your line of work, I will ask you to assume that you desire to deliver, we will say, 946 inches of water from the stream at two possible points of diversion, the Mill ditch, which is at Pine Street, and the point immediately above the dam of the defendant company; and assume that between those two points there are other users who take out [236] water through ditches for agricultural purposes, and also others who take out for similar purposes above the dam. I will ask you at which point, in your opinion, could you deliver the 946 inches, as between the two points that I have mentioned, and at the same time leave in the stream available for use the greater amount of water for the other users from the stream?

Mr. WILSON: That is objected to upon the ground that it is not a proper subject for the expression of opinion by the witness; it is a fact in issue which must be determined by the Court from the testimony as to the facts given by the witnesses.

The COURT: Well, you are assuming there is no other water coming into the stream but from the dam?

(Testimony of G. J. Hagens.)

Mr. WHITLOCK: That is correct.

The COURT: Well, you don't need any answer to that. I will say you could take it out to the best advantage above to escape evaporation. You don't need any opinion on that. Sustained.

Mr. WHITLOCK: Exception.

CROSS EXAMINATION by Mr. Mulroney:

The WITNESS: Asked to assume that above the dam indicated upon the map here water is taken out of the Effinger ditch, the Quast ditch and other ditches along there to the extent of 400 or 500 inches; that it is spread out upon the land at a point below the point of the dam in order to irrigate the crop; and having in mind my observation of the fact that the mountain is to the east from a half mile to a mile [237] and that there is a rather sharp slope from the mountain back to the creek; and being asked to state from my experience and observation where I would say that 400 or 500 inches would actually go after it is placed upon the land: I will say that you give me one condition there that doesn't exist, and that is the land doesn't slope from the east side toward the creek; it slopes in a southerly direction toward the river. If you will modify that I can answer it. Answering it, I will say that the line of seepage would be in a southerly direction toward the river, and possibly there is a deep gravel deposit there that doesn't reach the water at all. At any rate, my answer would be that from my actual observation of the

(Testimony of G. J. Hagens.)

creek and the valley and the mountain, the slope, that that 400 or 500 inches might get back to the creek to a very small extent—whatever could get away if there was enough water put on the ground at any time. My idea is that it goes in the ground and toward the south of the river, unless there was sufficient water to fill that gravel reservoir to overflowing; in that case it might outcrop pretty near the surface of the creek.

REDIRECT EXAMINATION by Mr. Whitlock:

The WITNESS: If the water did not seep in from the irrigation, as suggested to me by Mr. Mulrone, I would say that it would come from the bed of the stream, having come in from the stream at some point above. Dealing with a larger volume of water it would undoubtedly fill that reservoir of loose boulders underneath and outcrop in places. In order to maintain any uniformity in amount at the point below, it would be necessary to maintain the supply above and upstream.

Witness excused. [238]

Mr. WHITLOCK: We have a couple more engineers, your Honor, we expected to put the same questions to as to this witness. And I think in view of your Honor's ruling it is not necessary.

The COURT: Very well.

W. L. MURPHY,

a witness called in behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

The WITNESS: My name is W. L. Murphy. I am of counsel in this case. I am acquainted in a general way with the water works system which furnishes Missoula. I have no information about the preparations that were made for the location of the dam at the present point, having in mind particularly the acquisition of the site for it, except information from the record which is found in the clerk's office of the district court of this district, and I have only learned that recently so that no certified copy of it could be prepared. I have that original record here; it is in that case on the table there.

It is a proceeding in eminent domain in which the Missoula Water Company is plaintiff and James S. Kemp or J. S. Kemp is defendant, being the same plaintiff as in case No. 1953. The land sought to be condemned is the land upon which the dam and creek reservoir of the Missoula Water Company at that time was to be located and is now located. The date of the institution of that proceeding is in June of 1901; I don't remember the exact time. The original file is there that you might present it to counsel.

I am familiar with the parties to the old water right [239] suit the decree in which has been introduced in evidence; I know the names of the parties.

(Testimony of W. L. Murphy.)

Q. What have you to say as to whether some or many of those people are here and available.

Mr. WILSON: We object to this, if your Honor please, and to this line of testimony upon the ground that the matters involved or that could be involved in that litigation were all matters in issue in cause No. 1953, which has been concluded by a decree which cannot be impeached or collaterally attacked or——

Mr. WHITLOCK: It bears solely on the question of laches.

The COURT: Overruled.

Mr. WILSON: Exception.

A. I have a recollection and have refreshed that recollection in various ways so that I am sure that certain men testified in that case concerning the water rights involved in that case, and of those men I have jotted down the names of many that I remember who are dead; the name of——

Mr. WILSON: We object to counsel stating the names of the witnesses because that would be a matter which could be shown only by the record in the case and counsel's recollection would not be the best evidence.

The COURT: Is the record here?

The WITNESS: Asked what I have to say as to the record in the case as to the witnesses or evidence, and what effort I have made to obtain that, I will say that I have many times searched for a record or transcript of the testimony in the case, and that I have been unable to find, and after

(Testimony of W. L. Murphy.)

inquiry [240] of the clerks they have been unable to find any. However, there are certain minute entries made by the clerk in which the names of certain witnesses for the parties appear, but in practically all of those cases the clerk or someone has run a line through the minute entry containing the names of the witnesses. They are legible and can be seen but apparently are not a part of the clerk's minutes. That can be observed by the original judgment roll which is on the table before counsel for the plaintiffs.

Q. Well then, those persons, as you have examined those names—what has become of them? Are they available?

The COURT: Where has he got his information?

Mr. WHITLOCK: I am asking him for his own knowledge now.

The COURT: Witnesses he knew?

Mr. WHITLOCK: Yes.

A. Only as to witnesses that I knew.

The COURT: And at the time you yourself were present?

A. Yes.

The COURT: Oh, I think he may answer. I can't see it is very material.

Mr. WILSON: Exception.

A. The witness W. T. Hamilton is dead; the witness Father Palladino is dead; Thomas C. Marshall, who was a witness and one of the counsel in the case is dead; J. H. Harper I don't know.

(Testimony of W. L. Murphy.)

Alfred Cave, who was a manager of the water company, is dead; J. H. T. Ryman, who was a witness, is dead. Peter Fedderson was a witness; he has been here. C. E. Williams—I have endeavored to locate him and I have no knowledge as to whether he is living or dead, but I couldn't locate him. E. W. Schilling, a witness, is dead; Samuel Park, a witness, is [241] dead; H. A. Chaney, a witness, is dead; Herman Hutter, a witness, is dead; Ben Hanraher, a witness, is dead; and William H. Reed, a witness, is dead. Those are all the witnesses that I know and know that they are dead.

The WITNESS: I was present at the time of the trial.

CROSS EXAMINATION by Mr. Mulroney:

The WITNESS: I would know only by recollection the other witnesses besides those that I have already told you of. Of those that I remember, there is a Mr. Bain, who was the chief engineer, I think, for the plaintiff in the case; and there was George K. ———, who was the chief engineer for the defendants in the case. As to whether I don't remember the others, I don't know whether they are living or whether they are dead, but I know some of them. I recall others who are here besides Mr. Fedderson—Elmer Hughes, who was mentioned here this morning. As to whether there are any others offhand that I recall, I have made just these notes; I can take the record and——

The COURT: I understand there was no record.

A. Well, I explained to the Court that the names

(Testimony of W. L. Murphy.)

of the witnesses who testified in that record, in most instances there is a line drawn through them and they are evidently taken out by the clerk as of the record in this case. They are legible and can be read.

REDIRECT EXAMINATION by Mr. Whitlock:

The WITNESS: When I referred to the record you were not to understand me to be referring to a transcript of the testimony in the case. There is a record of minute entries which [242] shows the names of the witnesses who were called and examined in the case, but in nearly every instance you will observe a red line drawn in both directions through the names. That means evidently that they are not part of the official record.

RECROSS EXAMINATION by Mr. Mulroney:

The WITNESS: I have no information at all as to who actually drew the lines, but it is in the official file.

The COURT: What is the object anyhow of this?

Mr. WHITLOCK: Just bearing on the question of laches is all.

The COURT: Whose laches?

Mr. WHITLOCK: The laches of the plaintiffs in this case in bringing the matter to issue at a time when the witnesses had died.

The COURT: This is in the same suit?

(Testimony of W. L. Murphy.)

Mr. WHITLOCK: The same people who would know about this question of changing the point of diversion, whether it was considered at that time or not.

The COURT: Very well; proceed.

Mr. WHITLOCK: The judgment roll not disclosing that question.

Witness excused.

H. S. THANE,

a witness in behalf of the defendant, recalled for further examination, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

The WITNESS: Assuming that the dam is constructed in the Rattlesnake on bedrock, I would say that there is very slight [243] probability of water seeping under that dam. It is a tight dam, to the best of my knowledge and belief.

Witness excused.

Mr. WILSON: There was just a point. We had agreed that the Court might deem that the value of the amount in controversy in this case exceeds three thousand dollars, so we offered no testimony on the point and came near forgetting it.

Mr. WHITLOCK: That may be agreed.

The COURT: Very well.

Thereupon, the hour of 5:00 o'clock p. m. having arrived, the court was in recess and further trial of said cause was continued until Thursday, October 26th, 1933, at 9:30 o'clock a. m. [244]

J. C. SAIN,

recalled for further cross examination, and testified as follows:

CROSS EXAMINATION by Mr. Whitlock:

I participated in placing a weir and measuring the water at a point above defendant's dam, but forget the year and I cannot recall whether it was at the time of the measurements down at Pine Street or not.

ARTHUR STICHT,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

My name is Arthur Sticht; I reside in Missoula. In 1926, I made measurements to determine the flow of Rattlesnake creek at a weir placed in the creek above Effinger bridge, above defendant's dam. The weir was placed there at the request of Rattlesnake Irrigation Company committee. I made notes of the measurements and now refer to such notes. The placement of the weir was completed at 4:00

(Testimony of Arthur Sticht.)

P. M. August 7, 1926, and the measurement found to be 892 miners inches; on August 8th at 1:00 o'clock P. M. the measurement was 909 miners inches; on August 8th at 3:00 o'clock P. M. 909 miners inches; on August 9th at 3:00 o'clock, 975 inches; August 11th at 10:15 A. M. 1031.8 miners inches. There was supposed to be lake water turned in before this last measurement.

CROSS EXAMINATION by Mr. Mulroney:

The weir was approximately 100 yards above the Effinger bridge, which is below the intake of the Effinger ditch and the Franklin ditch is above that, way up, which is the only higher up ditch I know of. The weir was installed by the Rattlesnake people, myself included. Those actually constructing [245] it were E. E. Warner, J. C. Sain, none of whom were engineers. It was a ten foot weir and the whole stream went over the weir. On August 8th, the measurement was 909 inches. The depth of water over the crest of the weir at that date was $9\frac{1}{4}$ inches.

REDIRECT EXAMINATION by Mr. Whitlock:

The Mr. Sain, who helped construct the weir, is the Mr. Sain who just preceded me on the witness stand. According to the decree, the Effinger right was for 100 inches.

RECROSS EXAMINATION by Mr. Mulroney:

Where we measured is about the point marked "Effinger Bridge" on defendant's Exhibit 6 and

(Testimony of H. S. Thane.)

Spring creek comes into Rattlesnake below that, and was flowing approximately 40 or 50 inches.

H. S. THANE,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Whitlock:

I have previously testified in this case.

Q. I want you to assume the following, Mr. Thane,—assume that you have a stream bed in which some of the water sinks and reappears in the bed of the stream at a lower point, and assume that in order to furnish a given flow of water below the point of reappearance it is necessary to maintain a stream of flowing water over the bed last described,—is it possible, in delivering such amount of water, to get any benefit from any such water which sinks and reappears?

A. No there is not.

Mr. WILSON: We object. It isn't a proper subject of opinion evidence and is incompetent, irrelevant and immaterial and is a matter that must be de- [246] termined by the Court as a fact.

The COURT: You mean where the sinking and reappearance would be constant?

Mr. WHITLOCK: Yes, if your Honor please,

The COURT: He may answer it. I think it is self evident. The objection is overruled.

A. No it is not possible to get any benefit at the lower point.

(Testimony of H. S. Thane.)

That is because if any water rises after sinking, it must be immediately replaced at the upper point where it sank, which must be from the flowing stream.

A. That replacement would be from the flowing stream. Of course if any water passes from the bed it would be immediately replaced.

The COURT: In other words, two and two make four?

A. Exactly. You can't add anything to the creek.

The COURT: Proceed.

Q. And on such a stream as I described in the last question, what happens with reference to the sinking and reappearing water when the flow is cut off above?

Mr. WILSON: Objected to. No such opinion can be expressed.

The COURT: The Court, if it is entitled to no consideration, will give it none. For the sake of the record, your objection is overruled.

A. In such a situation the flow at the lower end would continue for some time but at a decreased rate, and would finally stop.

Q. Now in view of your answers to the two preceding questions, if you assume in this case this,—we will say 200 inches of water which has sunk at some point above in the bed of the stream, re-appears at Pine Street, that is, the head of the Old Williams [247] ditch, the old mill ditch,—how much water would you have to let down at a point

(Testimony of H. S. Thane.)

above to deliver 946 inches continuous flow at the mill ditch, if you assume that you are to make no deduction for loss on the way?

Mr. WILSON: Objected to. It is not a matter on which the witness has shown any qualification to express an opinion, if an opinion can be expressed, in any case, and is wholly immaterial.

The COURT: Where is your evidence that 200 inches sinks above?

Mr. WHITLOCK: I am using the figures of the plaintiff.

The COURT: For the sake of the record,—if it is entitled to no consideration the Court will give it none,—the objection is overruled.

Mr. WILSON: Exception.

A. I think it is obvious that it would take 946 inches.

CROSS EXAMINATION by Mr. Mulroney:

My answers are based on the assumption that there isn't any other water coming into the stream from the west at all.

Mr. WHITLOCK: We have, if your Honor please, and offer in evidence a certified copy of the complaint referred to in the testimony yesterday, in the case of Missoula Water Company against J. S. Kemp, being the complaint in the condemnation proceedings.

Mr. WILSON: To which we object on the ground that it is immaterial and throws no light on the issues involved in this case.

(Testimony of H. S. Thane.)

The COURT: What is the object?

Mr. WHITLOCK: It will show, if your Honor please, that long before this suit, that the matter was known and [248] a matter of public record, that preparations were being made for taking the water out at the present point, and will show also that the same Court who made the order in that case was the Judge who tried the water suit and entered the decree in case 1953.

The COURT: It seems to be a far fetched defense but the Court will allow it to be introduced and if not material it will be ignored.

Mr. WILSON: Exception.

Thereupon Exhibit 14 was admitted in evidence and is as follows: [249]

EXHIBIT NO. 14.

In the Fourth Judicial District Court.

State of Montana,
County of Missoula.—ss.

Missoula Water Company, a Corporation,
Plaintiff,

vs.

J. S. Kemp,

Defendant.

Plaintiff complains of the defendant and for cause of action alleges:

That the plaintiff is and at all the times hereinafter mentioned was a corporation organized and existing under the laws of the State of Oregon.

That the said plaintiff was organized for and for several years last past has been engaged in the business of supplying the City of Missoula and the residents thereof and in the vicinity thereof with water for domestic, agriculture, fire and other useful and beneficial purposes.

That the defendant is the owner of the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of S. 2 T. 10 N. R. 19 W.

That the increased consumption of water and the prospect of increase in the requirements for water by the City and residents of the City of Missoula and vicinity for the purposes aforesaid and to obtain a supply of water pure and unpolluted and free from deleterious substances it has become necessary for the said plaintiff to lay, construct and maintain a new or other flume or pipe line as a conduit, taking and diverting the water from the Rattlesnake Creek at a point above the present point of diversion and taking it thence to a point higher on the hill or bluff north of the City of Missoula and this is necessary also for the purpose of giving to the City of Missoula, in order to protect it against conflagration and to enable it to successfully fight fires, and additional pressure.

That in order to divert said water and to make the improvement necessary and required it is and

has become necessary to construct on the land of the defendant a dam or weir for the purpose of raising the said water and also for right of way for said main, pipe line or conduit across the land of the said defendant, said right of way being for a pipe line laid under ground across said land.

That in the construction, operation and maintenance of the said weir, dam, flume, or pipe line a small portion of the land of the said defendant will be flooded or overflowed. [250]

That a particular description of that portion of the said defendant's land required for the purpose of the said weir or dam site and for flowage hereinabove enumerated is described as follows, to-wit: Beginning at a point 2100 feet west, and north $3^{\circ} 5'$ east 124.6 feet from the quarter corner between sections 1 and 2, T. 13 N. R. 19 W. of the P. M. M., thence north $3^{\circ} 5'$ east 102.6 feet; thence north $19^{\circ} 9'$ East 104.6 feet; thence $8^{\circ} 49'$ east 432.5 feet; thence North $37^{\circ} 23'$ West 165 feet; thence north $81^{\circ} 51'$ west 60 feet; thence south $25^{\circ} 24'$ west 330 feet; thence south $16^{\circ} 10'$ west 400 feet; thence south $74^{\circ} 15'$ east 313 feet to place of beginning, containing an area of 4.28 acres. That a map or plat of said land is herein filed as part hereof marked Exhibit "A".

That portion required for right of way for said flume or pipe line leading the water from said weir or dam is described as being fifteen (15) feet on either side of a center line, described as follows, to-wit: Beginning at a point 772 feet south from the center of S. 2 T. 13 N. R. 19 W. P. M. M.; thence

north $35^{\circ} 20'$ east 38 feet; thence on a curve of 20° to the left 95 feet; thence north $16^{\circ} 20'$ east 264.2 feet; thence on a curve of 30° to the left 90 feet; thence north $10^{\circ} 40'$ west 61.9 feet; thence on a curve of 36° to the right 107.9 feet; thence north $28^{\circ} 10'$ east 461.4 feet; thence north $61^{\circ} 45'$ east 29 feet, making a total distance of 1147.4 feet and 30 feet in width, being 15 feet on either side of the center line, containing an area of 80/100 acres. That a map or plat showing the said land and right of way is herein filed as part hereof, marked Exhibit "B".

That the said plaintiff has made an effort and endeavored to arrange with the said defendant for the purchase of said easement for said weir, dam, flowage right and right of way, but that the said plaintiff and defendant have been unable to agree with respect thereto, and that the plaintiff is ready and willing and hereby offers to pay to the said defendant the reasonable value of the lands required as aforesaid and the damages resulting to the said defendant by reason thereof, but that he cannot arrange to purchase the said right required as herein set forth.

WHEREFORE Plaintiff prays a judgment against said defendant and decree of this court that the easement over, across and upon the land of the said defendant for the construction, maintenance and operation of said weir, dam, flume or pipe line be condemned and that said plaintiff have and recover the easement for said purpose and to the

end that the said plaintiff may make compensation to the said defendant therefor, plaintiff prays that this court will appoint three disinterested persons, residents of the County of Missoula, to view, appraise and value to the value of the lands of the said defendant so taken and required as aforesaid, together with any and all damages that may be sustained by him and that the said plaintiff have such relief in the premises as the situation seems to demand and as in duly bound will ever pray.

S. G. MURRAY &
MARSHALL & STIFF

Attorneys for Plaintiff. [251]

State of Montana,
County of Missoula—ss.

Fred T. Sterling being duly sworn on his oath deposes and says that the plaintiff in the foregoing action is a corporation organized and existing under the laws of the State of Oregon; that he is the agent and attorney in fact of the said plaintiff; that he has heard read the foregoing complaint and knows the contents thereof and that the same is true to his best knowledge, information and belief.

FRED T. STERLING.

Subscribed and sworn to before me this the 17th day of June 1901.

[Seal]

HENRY C. STIFF,
Notary Public in and for Missoula
County, Montana.

Following indorsement on back:

No. 1930. In the District Court of the Fourth Judicial District of the State of Montana, in and for Missoula County. Missoula Water Co. Plaintiff, vs. J. S. Kemp, defendant. Complaint. Filed 17 day of June 1901, R. W. Kemp, Clerk, by J. S. Kemp, Deputy Clerk. S. G. Murray, Marshall & Stiff, Missoula, Montana, Attorneys for Plaintiff.

Office of the Clerk of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula—ss.

I, J. R. Donehoo, Clerk of the Fourth Judicial District Court of the State of Montana, in and for the County of Missoula, said Court being a Court of Record, having a common law jurisdiction, and a Clerk and Seal, do certify that the above is a true copy of the complaint in Cause No. 1930, as the same appears upon the Records of said Court, now in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the said Court at Missoula, Montana, this 26th day of October, in the year of our Lord, one thousand nine hundred and Thirty Three.

J. R. DONEHOO,
Clerk. [252]

Thereupon Exhibit 15 was offered and admitted in evidence over plaintiffs' objection and is as follows: [253]

EXHIBIT NO. 15.

In the Fourth Judicial District Court

State of Montana,
County of Missoula.

Missoula Water Company,

Plaintiff,

vs.

James S. Kemp,

Defendant.

This cause coming on to be heard this the 10th day of August, 1901, upon the order to the said defendant contained in the summons to show cause, if any he had, why the property mentioned in the complaint should not be condemned for right of way of weir, dam and pipe line for plaintiff's water works, and commissioners appointed to appraise the damage by him sustained by reason of the appropriation of said property for the purpose aforesaid, and the same having been heard by the court on the 3rd day of August and by it taken under advisement.

And it appearing to the Court that the said James S. Kemp had appeared in said action and filed a demurrer to the complaint, S. G. Murray and Marshall & Stiff appearing for the plaintiff and Woody & Woody appearing for the above named defendant and demurred to the said complaint.

NOW, THEREFORE, the said demurrer is hereby overruled and the Judge of this Court being satisfied that the public interests require the prosecution of the enterprise mentioned in the complaint and that the lands proposed to be taken are required and necessary for the purpose of said enterprise.

NOW, THEREFORE, John Rankin and O. E. Peppard and George F. Brooks, three competent and disinterested persons, citizens of the said County of Missoula, be and they are hereby appointed commissioners to ascertain and determine the amount to be paid by the plaintiff to the said James S. Kemp as compensation for the land taken and other damages by reason of the appropriation of said property by the plaintiff. It is further ordered that the said commissioners hold their first meeting at the office of the Clerk of this Court in the City of Missoula, County of Missoula, Montana, on the 20th day of August, 1901, at two (2) o'clock P. M. and that the compensation of the said commissioners be and the same is hereby fixed at the sum of ten dollars each, for each and every day by them actually and necessarily employed in and about the duties as such commissioners.

And the said commissioners shall within thirty (30) days after making their appraisalment and assessment of damages file a report of their proceedings accompanied by a map of the dam site and right of way showing the location and termini thereof. Done in open court this 10th day of August, 1901.

FREDERICK C. WEBSTER,

Judge. [254]

Following indorsement on back:

1930/4

Missoula Water Co. vs. James S. Kemp.

Order appointing Commissioners. Filed August
10th, 1901.

R. M. Kemp, Clerk H 128

Office of the Clerk of the District Court of the
Fourth Judicial District of the State of Mon-
tana, in and for the County of Missoula—ss.

I, J. R. Donehoo, Clerk of the Fourth Judicial
District of the State of Montana, in and for the
County of Missoula, said Court being a Court of
Record, having a common law jurisdiction, and a
Clerk and Seal, do certify that the above is a true
copy of Order Appointing Commissioners, No. 1930,
Missoula Water Co. vs. James S. Kemp, as the same
appears upon the records of said Court, now in my
office.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the Seal of said Court at
Missoula, Montana, this 26th day of October, in the
year of our Lord, One thousand nine hundred and
Thirty Three.

J. R. DONEHOO,

Clerk. [255]

Mr. WHITLOCK: And counsel have agreed
with me, and the record may show, that the Judge
who signed the order, being the last exhibit intro-

duced, was Frederick C. Webster, the same Judge who tried and signed the decree in cause number 1953, and that J. S. Kemp, the defendant in the action, the complaint in which has just been introduced, was likewise a defendant in cause number 1953.

Mr. WILSON: We agree to that, subject to our objection that it is incompetent.

The COURT: Very well. Overruled.

Mr. MURPHY: There was no transcript of the evidence at all in the cause 1953,—I desire to correct that statement by saying that there was a transcript prepared on one right, the Williams right, which I have seen.

The COURT: Very well.

Mr. WHITLOCK: Defendant rests.

PLAINTIFFS' REBUTTAL

WILLIAM SWEARINGEN,

called as a witness in rebuttal and having been heretofore sworn testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

I have heard the witnesses mention the tube or pipe crossing the road on the Fredline ditch and carrying the water flowing in the Fredline ditch on down. I have measured the carrying capacity of that pipe yesterday, which carrying capacity is between 160 and 250 miners inches. The ditch itself will carry

(Testimony of William Swearingen.)

more water than the pipe will, because the city has had trouble with it in several years past by overflowing [256] at Van Buren Street, where it crosses Van Buren Street, because the pipe does not have the capacity to carry the water coming to it across the street. The carrying capacity of the ditch is greater than that of the pipe.

I heard Mr. Hagens' testimony given yesterday to the effect that water used upon the lands in Rattlesnake Valley east of the creek for irrigation, instead of seeping and percolating under ground, took back westwards and southwestwards and into Hellgate River, and I have had occasion to make observations reflecting on that condition in this way: That I was on the original sewer job proposed from the Rattlesnake creek, with my father; since then I have refreshed my memory from these notes. There is what is known as a rock dyke running in a southeasterly or northwesterly direction across the Rattlesnake Valley pretty generally from the lower end of the Greenough Park over towards the mouth of Hellgate canyon, and that dyke naturally would force any water coming down through there to come to the surface or very close to the surface at that point. This Greenough Park wouldn't be over 600 feet north of the head of Mill ditch, that is, the south end of Greenough Park would be 300 to 600 feet north of the intake into the Mill ditch. From that point Greenough Park extends approximately a quarter of a mile north of the city limits. This rock

(Testimony of William Swearingen.)

dyke or rock formation would cut the Rattlesnake Valley, and running eastwards. The rock formation in all this country slopes more or less southwesterly, that is, the stratafication runs down towards the south and west, and that applies to the east side of the Rattlesnake Valley or Rattlesnake Creek.

CROSS EXAMINATION by Mr. Whitlock:

The first evidences of this dyke is about 100 feet [257] north of the south end of Greenough Park and three and a half miles below defendant's dam. The direction of the dyke is toward the Missoula River, more toward what we call the foot of Jumbo, east of the Rattlesnake.

RUSSELL MILLER,

called as a witness in rebuttal and having been heretofore sworn testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My explanation of why I did not bring nor participate in bringing a suit such as this previously to the year 1933 is that if the Water Company or anyone had taken all my water I most certainly would have gotten down to business. As it was, at times the Water Company took a part of it, that is, in the dry season. Now the amount they took to the portion of the whole amount would be almost negligible, maybe one-half of one percent, if you consider the whole flow of my water for the year. And then here

(Testimony of Russell Miller.)

was another thing. When I went there, or after being there for a while I had confidence enough in my water flow, being there with it for several years, that I borrowed money and put in a young cherry orchard and I have grown that cherry orchard over a period of eight or ten years into maturity and it was in maximum production. If I had been lax about looking after my water I wouldn't have grown my cherry orchard to that extent, and I didn't consider that because of the times I lost a small portion of my water that meant that I had neglected my water rights as a whole, when the Hamilton ditch immediately above, maybe twenty rods above the Hollenbeck ditch, practically every year for short periods has thrown a dam across and taken all of the water maybe three or four days before we realized what had happened, and we would go and see about our water. Well now they would have our water [258] for short periods, but that wouldn't necessarily mean I figured they had a right to our water because they took it up there, and for that matter when the Water Company would,—or sometimes I figured the Water Company wouldn't come down the creek,—anyway it wasn't for me,—when the Hollenbeck ditch got short and I didn't get enough water I used to go up the creek where the ditch,—where they had water for me higher up, and turn on a big head of water in that ditch and carry it down across my land to the Hollenbeck ditch and water my stock anyhow. Now I presume at times I was taking maybe the city

(Testimony of Russell Miller.)

maybe Lord knows whose water it was, water above the dam; they had taken my water below and I was right if I took it above and carried it across my land to the Hollenbeck ditch, and I figured not because I wouldn't have the nerve to presume that because the Water Company had,—because I had had the Water Company's water in those periods that they had lost any rights to it; that has been my theory of it; there hasn't been the urge to go ahead and carry on a suit as long as I didn't have enough provocation, I would get my crop and I developed my orchard and things have been fairly satisfactory. I do say this, I believe they have got more of my water at any rate than I have theirs.

Concerning the slope, I have made observations of the slope on both sides. We have two or three levels; we call them benches. Each bench is a drop of 8 or 10 feet from the one above. Practically all the land irrigated is on the upper bench and the slope is generally toward the Rattlesnake, although of course, it also slopes towards the river.

J. C. SAIN,

one of the plaintiffs, was called in rebuttal, and testified as follows: [259]

DIRECT EXAMINATION by Mr. Wilson:

The reason I haven't started nor joined in the bringing of a suit such as this previously to the

(Testimony of J. C. Sain.)

year 1933 is because in 1925, which was a dry year, they, the Water Company, were taking practically all the water, so in 1926, we made our weir and we checked up on them, and they were taking our water. The dam and works of defendant's predecessor were built long prior to the year 1925 and the pipeline was constructed and installed before 1925, also the reservoir; previous to that time I had been able to get my water and grow my crops and work my land reasonably well. As to the slope or drainage of water used for irrigation on the east side of Rattlesnake creek in Rattlesnake valley, on my place, I got a bench above where I grow alfalfa, and a bench a little lower down, and I got to be very careful watering this alfalfa or I drown out this bench below. The bench below lays on the west side of the alfalfa field and next to the Rattlesnake towards Rattlesnake creek. I only irrigated that place once this summer. That was along about the last of July—when the water began to get a little scarce I could water the alfalfa, it never got dry. When I watered the alfalfa there was moisture on this lower bench.

CROSS EXAMINATION by Mr. Whitlock:

I have no knowledge of water being taken into the Mill ditch since I have been farming on Rattlesnake.

I. Q. ROBERTS,

called in rebuttal and testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

I located up Rattlesnake in the spring of 1902 and the reason I did not bring nor participate in bringing a suit such as this previous to 1933, is because I've got only a very small [260] tract of land, only five acres, and I have a right in two ditches and I used to have sufficient water to raise my crops, I had no reason to make any complaint. I get a right out of No. 5 through the Williams ditch which takes out above defendant's dam, and the rest of my water takes out through the Cobban-Raymond ditch below the dam.

ED RAY,

called as a witness in rebuttal, having been heretofore duly sworn testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My water right is taken out through the Effinger ditch above the dam.

The reason I did not bring nor participate in bringing a suit such as this prior to 1933 is that in 1921, 1922, and 1923 I had the water just the way it was decreed, and then in 1924 they started to take all,—well they took it maybe in the day time and nights they let me have it and then I opened up the ditch and had it again and flooded my land;

(Testimony of Ed Ray.)

they never took it away from me until in later years. In 1929 they took it and in 1926. I remember 1931; they took it that year, but I went up and got it.

CROSS EXAMINATION by Mr. Pope:

We had rows in 1924 over the water. There was no water commissioner that year and the Water Company shut down my ditch and I know they had no right, and we had rows back and forth. I told them once that he better leave my headgate alone, and he did. I testified yesterday that in 1924 I went to see my attorney about it.

L. E. TUCKER,

called as a witness in rebuttal and testified as follows: [261]

DIRECT EXAMINATION by Mr. Wilson:

While living in Rattlesnake Valley I have made observations as to the drainage of water used in irrigation. It drains southwesterly, considerably more west than south. Mr. Miller's place was just below me, pretty near west of where I had irrigated and he used to complain considerably to me when I would be irrigating, about my drowning his crop out below. His land was toward Rattlesnake Creek from mine. I judge, his land was a quarter of a mile from the Rattlesnake Creek channel.

(Testimony of L. E. Tucker.)

I had 45 inches from right No. 5, taken through the Williams ditch above defendant's dam. I had 40 inches in the Hollenbeck ditch coming out below the dam. Right #20 was taken out through the Quast-Kemp ditch or Quast-Tucker ditch, which takes out above the dam, probably between a quarter and a half mile. Right No. 21 takes out through the Cobban-Raymond ditch, which heads below the dam. The year 1926 was a fairly representative year, average year, of the flow of Rattlesnake Creek from a seasonal standpoint, a water standpoint. I think there was a little more water in 1927 and in 1925, but 1926 was a fairly average year.

CROSS EXAMINATION by Mr. Whitlock:

I am speaking for the time I lived on Rattlesnake.

It was agreed between counsel, while the witness Tucker was testifying that the ditches shown upon the maps and mentioned at the trial constitute all the ditches that take water out of Rattlesnake Creek.

J. S. JACKMAN,

called as a witness in rebuttal and having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Wilson: [262]

I reside in Rattlesnake Valley up on the bench a quarter of a mile east, about a mile above Greenough Park; and have made observations as to the drainage in Rattlesnake Basin of water used for

(Testimony of J. S. Jackman.)

irrigation on the bench on the east side. When irrigation is a heavy flow in the valley, seepage water rises up in our cellar every year; we have a concrete cellar, made nearly water tight, and yet water comes up after the crest of the high water in the creek. This year the first water appeared in our cellar on July 5th; high water in the creek was then past; the maximum rising in the cellar was July 7th and remained thirty days. This cellar is approximately a quarter of a mile from Rattlesnake Creek and about a mile above the head of the ditch.

CROSS EXAMINATION by Mr. Pope:

The irrigation on Rattlesnake is practically all north above my place.

REDIRECT EXAMINATION by Mr. Wilson:

The surface flow at my place, to show whether the drainage is southwestwards to the Missoula River or westwards to Rattlesnake Creek, I explained directly east of our concrete cellar, we have an open pit; it is about two or three feet deeper than the water, and my observation is that the rise and fall in the water in these two places is simultaneous. The irrigation, with reference to my place, is north, slightly eastward, about 10° east. I live on the Jackman Floral Villa, and I would say from my place the water will flow more toward Rattlesnake Creek than toward the river.

RECROSS EXAMINATION by Mr. Pope:

Witness places cross mark on map, Plaintiffs' Exhibit 1, with pencil, just below where words

“Park Addition” are written, [263] as the location of his place.

JOE McDONALD,

called as a witness in rebuttal and testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

My observations as to draingage of water used for irrigation on the east side of Rattlesnake Creek in Rattlesnake Valley is that it is all practically to the west, with a little south. I have made observations as to that. On the same bench as Mr. Miller described, when I am irrigating a little north of Mr. Miller's place, the water will rise on the lower land by the barn and one place a regular spring. I have alfalfa that is drowned out, which is directly west of where I have irrigated, and toward Rattlesnake Creek. The first year I worked the land I occupy was 1931.

I got plenty of water that year to the middle of July, when right No. 20, where I got the bulk of my water was shut down completely and kept down for three weeks and my crop completely burned up; by that I mean it was completely lost. In one field I didn't even get pasture. I had a little more water in the beginning of 1932 and got a crop in a little early with this early runoff water, but was shut off completely in the first part of August and was caused considerable damage before the crop

(Testimony of Joe McDonald.)

was matured. I used the same system in 1933 and got the crop in early and with an early variety of grain, which matured before the water was shut off, which wasn't until later in August.

CROSS EXAMINATION by Mr. Wilson:

My west boundary is in places an eighth of a mile and some places a half mile from Rattlesnake Creek, and my east boundary is some two miles up in the hills. My buildings are less than a quarter of a mile from the creek. The upper ditch crosses [264] the full length of my place for some two miles from where it enters, and it enters on the northwest corner, 100 yards from the creek and leaves it about a half mile from the creek.

C. W. LEAPHART,

called as a witness in rebuttal and testified as follows:

DIRECT EXAMINATION by Mr. Wilson:

I have made observations as to the drainage on the east side of Rattlesnake Creek in Rattlesnake Valley. My observations were largely in connection with the Hollenbeck ditch, the ground above that is always seepage from the irrigation on Mr. Sain's place, and that seepage water is coming pretty well down west. Mr. Martinson has an ice pond and complains when we are irrigating that we are flooding his place and although we are careful, there

(Testimony of C. W. Leaphart.)

has always been a heavy seepage down into his ice pond, which is going west from our ditch, and he wants to keep free of water during the summer time. Another seepage we notice especially is in connection with this Fredline ditch. When the water gets short, we block all the water coming down the Rattlesnake at our dam at the head of Hollenbeck creek. The water commissioner insists even before the water is at its shortest point that we place sacks across the creek in order to get all the water that is coming down so that none will go to waste, so that our dam turns the entire flow coming down the creek into the Hollenbeck ditch, and we have also dammed off the west branch of the creek, because our Hollenbeck ditch is superior to the Hammond-Day-Brennan ditch. We have a concrete dam and have sacked to make a complete dam across the stream, and fill in with loose dirt in every way we can, thus taking the entire flow of Rattlesnake Creek at that point. Sometimes we get more than our 195 inches decreed for the ditch and that [265] has been our practice since prior to the year 1924, the water commissioner insisting that we do not permit any waste water to run past our dam.

The reason that I did not bring or participate in bringing an action such as this prior to 1933 was because the Hollenbeck ditch is fairly fortunately situated in that the ditch gets a seepage of about 40 inches, between the dam and the head of Hollenbeck ditch; then we get the morning spill from the

(Testimony of C. W. Leaphart.)

dam, and that helps somewhat, and while I have been irritated with the shortage a little in previous years I have never failed to have my land in growing condition. It never dried up.

Adding to what I have said about seepage water, we live north of Roscoe Jackman's place and we who live east, it takes two jogs in the road of about 100 yards each before we strike that south line going by the Jackman place and that is out of my south line. Now there are other farmers, Mr. Sain and a small place west of me and one or two others that are doing irrigating to the west of us but most of this irrigating is still to the east of my west lines.

CROSS EXAMINATION by Mr. Whitlock:

The Hollenbeck ditch has been cleaned out either last year or the year before, 1931 or 1932. Before that it had a concrete dam and now a concrete dam which is a little on the west side for high water time and the space is filled up with sacks. We dam it full with sacks of dirt and earth all the way across. Those are placed on the surface. I suppose at the driest time there is water going to the west of that dam. The branch to the west is called the Hamilton-Day-Brennan ditch. It runs a little west then the ditch takes it all. The Hollen- [266] beck ditch always gets some seepage, which I estimate at around 40 inches. The course of the ditch is generally southeasterly from the creek.

(Testimony of C. W. Leaphart.)

EXAMINATION by the Court:

Q. Seepage from where?

A. Seepage from,—you mean into the Hollenbeck ditch?

Q. Yes.

A. I have never examined it closely from there on above; I know that when the dam was cut to enter that we still have that water in the Hollenbeck ditch when no water is going over the dam, there is still water coming in the Hollenbeck ditch.

Q. You mean it comes out of the creek?

A. Yes it comes out of the creek.

Q. You mean that the seepage is down the creek, from the creek bed?

A. It comes from the creek bed where it seeps in.

Q. The Court understood you to say you got along reasonably well?

A. I have gotten along reasonably well.

Q. How many use water and drown out the neighbors?

A. No one, I don't think that there has been a remonstrance of anyone drowning out the neighbors; now I spoke yesterday about this drowning out of Mr. Boles potato patch a little further down.

Q. Well you speak here of from Sain's place there is some seepage down below?

A. Yes that is all, it is pasture ground, from the Hollenbeck ditch, it is still his ground but it is pasture land and it is a wet field during the dry time of the year.

(Testimony of C. W. Leaphart.)

Q. In other words you say in your ditch there is not much [267] wastage from it, continuing to the ice pond?

A. I don't think it comes from our ditch, no, it is coming out,—of course that is Mr. Martinson's claim and I don't know, I suppose maybe some of it comes from our ditch, as careful as we may try to be,—but it is coming out of the hillside or seepage that comes from the bed of the stream. There is one thing I might mention that I think Mr. Jackman covered, that our water there frequently will vary so that the well goes dry, and then the Rattlesnake,—it goes dry around February; the rise in the water will be,—my well is 52 feet deep; I have had occasion to put an electric pump on it and I have to have it set in the well pretty well up in the winter time. I have maybe two or three feet of water all the time; in the summer time it will be within 17 feet of the surface and at the time that is high irrigation is the lowest time in the well, which I suppose is natural.

CROSS EXAMINATION (continued)

by Mr. Whitlock:

It is 300 or 400 yards from my well to the creek channel. My land is on the benches and at the foot of Jumbo mountain, and the well is about 125 yards or 150 yards from the foot of the mountain.

Mr. WILSON: I am going to offer in evidence a certified copy of the judgment roll of the district Court of Missoula County in cause 9658, in the case

(Testimony of C. W. Leaphart.)

in which L. E. Tucker was plaintiff and Missoula Light and Water Company, a corporation, and C. H. Christensen, was defendant. This Missoula Light and Water Company was the predecessor of defendant.

Mr. WHITLOCK: Objected to as not material to any issue [268]

The COURT: What is the object?

Mr. WILSON: It is offered on the question of laches of the predecessor of the plaintiff McDonald, and it shows the taking of the water by the defendant company, and we think possibly of the present defendant, during the years involved in this action, which were the years 1921, 1922 and 1923, was over the protest of the then occupant and owner of the lands, and for which he sued for damages and which judgment for damages was given him and which was paid by the Missoula Light and Water Company for the taking of this water from him.

Mr. WHITLOCK: We further object to it——

The COURT: ——It will be admitted; if not competent the Court will ignore it.

Mr. WHITLOCK: Exception.

Thereupon was received in evidence the instrument referred to which is identified as Plaintiff's Exhibit 16, on file with and a part of the original exhibits in this cause.

The judgment roll here offered in evidence and being plaintiffs' Exhibit 16 is lengthy and for brevity the same is not here set forth at length but is in substance as follows: The plaintiff who was the predecessor in interest of Joseph H. McDonald, one of the plaintiffs in this action in the ownership of the lands and water rights claimed by said Joseph H. McDonald, brought suit to recover damages against the defendant who was the predecessor of the defendant in this action and a public service corporation supplying Missoula and its inhabitants with water from Rattlesnake Creek; plaintiff in that action claiming that during the irrigation seasons of 1922, 1923 and 1924, the defendant in that action diverted and used the waters of Rattlesnake Creek which said plaintiff was entitled to use. Plaintiffs' [269] use was for irrigation upon his lands consisting of One Thousand Three Hundred Fifty-six (1,356) acres of which One Hundred Seventy-five (175) acres were irrigable from the waters of Rattlesnake Creek and from no other source. The complaint refers to and describes in haec verba the decree in cause No. 1953, and is in three counts, the first for alleged, unlawful interference in 1922 with plaintiffs' use of the water, the second for alleged, unlawful interference in 1923 with plaintiffs' use of the water, and the third alleged, unlawful interference during 1924, with plaintiffs' use of the water. Except as the same apply to different years, the character of the claims in the several causes of action are the same. The plaintiff claimed damages totaling upon the three

causes of action the sum of \$46,403.00. By answer plaintiffs' claims for damages were denied and certain affirmative matters, not herein important, were set out which were put in issue by a reply. Before trial was had with a jury and by the pleadings and the stipulations of the parties, the trial resolved itself concisely to the question of defendant having prevented plaintiff using water which plaintiff had the right to use for the irrigation of his land and the extent of the damage done by such interference, if interference there was. The jury returned a verdict for the plaintiff for \$22,726.90 and judgment thereon is as follows:

JUDGMENT ON VERDICT.

This action came on regularly for trial upon the 28th. day of January, 1926, the said parties appeared by their Attorneys S. P. Wilson and Mulroney & Mulroney, Counsel for plaintiff, and Fred J. Furman and W. M. Bickford, Counsel for Defendants. A jury of Twelve persons was regularly impanelled and sworn to try said cause. Witnesses on the part of the plaintiff were sworn and examined. No witnesses were sworn or examined on behalf of the defendants, or either of them. [270]

After hearing the evidence, the arguments of Counsel and instructions of the Court, the Jury retired to consider of their verdict, and subsequently returned into Court with the following verdict, which was duly received and filed, to-wit: Title of Court. "L. E. Tucker, Plaintiff, vs. Missoula Light and

Water Company, a Corporation, and C. H. Christensen, and Missoula Public Service Company, Successor to Missoula Light and Water Company, defendants.

VERDICT.

We, the jury in the above entitled action, find the issues herein in favor of the plaintiff and against the defendant, and we fix the plaintiff's damages at the sum of Twenty-two Thousand seven hundred and twenty-six Dollars and 90 cents, \$22726.90, together with interest at the rate of 8%.

G. E. WARD, Foreman."

Wherefore by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, L. E. Tucker, do have and recover judgment against the defendants Missoula Light and Water Company, a corporation, and C. H. Christensen, and Missoula Public Service Company, Successor to Missoula Light and Water Company, for the sum of Twenty-two thousand seven hundred and twenty-six dollars and ninety cents (\$22726.90), together with his costs herein fixed at the sum of \$177.90.

Judgment entered this 4th day of February, A. D. 1926.

[Seal]

H. M. RAWN, Clerk.

RUTH KEITH, Deputy Clerk.

An appeal was taken by defendant and was decided and is reported in *Tucker vs. Missoula Light and Railway Company et al.*, 77 Mont. 91 and 250 Pac. 11.

E. C. MULRONEY,

called as a witness in rebuttal and having been first duly sworn testified as follows:

DIRECT EXAMINATION by Mr. Wilson: [271]

The judgment, entered in the case in which the judgment roll has just been introduced was finally paid by the defendant after the judgment had been affirmed by the Supreme Court.

Mr. WHITLOCK: Counsel called my attention that perhaps the exact difference in elevation between the old mill ditch and the defendant's dam does not appear, in [272] feet. Counsel have agreed with us to take the engineer's figures for that. The difference in elevation is 305 feet.

Counsel have agreed that the old reservoir on the top of the hill above Missoula was close to the present reservoir on top of the same hill.

Mr. MULRONEY: Yes, we agree to that.

And thereupon the testimony was closed.

Mr. WHITLOCK: If that is all of the evidence the defendant, for the purpose of the record, at this time after the close of all of the evidence moves to dismiss this action for the reasons:

First: That there are no facts shown here entitling the plaintiffs to any equitable relief.

Second: That there is no evidence of any detriment caused to the plaintiffs by the diversion of water by the defendant at the present point of diversion and no evidence even bearing on that ques-

tion related to the time when the plaintiff's appropriations were made or when the point of diversion was first established at the present point.

Third: For the reason that the diversion of the water at that point, as shown by the uncontradicted evidence, has been continuous and uninterrupted under claim of right for more than thirty years.

Fourth: For the reason that the evidence does not show the defendant has at any time deprived the plaintiffs or any of them of any water [273] to which they or he were entitled.

And for the further reason that under the evidence shown here the plaintiffs are barred from maintaining any action by virtue of their laches in the premises.

Thereupon the case was by the Court taken under advisement, with the understanding that the matter should be submitted on briefs.

Mr. WHITLOCK: If the matter is to be submitted on briefs we would like a ruling upon our motion to dismiss.

The COURT: That will be taken under advisement along with the case itself.

Mr. WILSON: Plaintiffs would like to make request for findings for the Court to make findings of fact in the case, and the plaintiff would like the privilege of submitting their request for findings with the brief.

The COURT: You may.

Mr. WHITLOCK: And the defendant joins in the request that the Court make findings of fact and

conclusions of law, and now at the close of the evidence submits and asks leave to file their proposed findings of fact and conclusions of law in this action.

The COURT: It may be done.

Thereupon plaintiffs were allowed ten days within which to file proposed findings of fact and conclusions of law and the defendant was given ten days thereafter within which to file proposed findings of fact and conclusions of law.

Plaintiffs' request for findings are as follows:
[274]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I.

Plaintiffs are and each of them is a citizen of the State of Montana, and a resident of Missoula, Montana; defendant is a corporation organized and existing under the laws of the State of New Jersey and is a citizen of the State of New Jersey. Jurisdiction in this case arises and is conferred upon this court by reason of the diversity of citizenship of the parties to the action. The matter in controversy in the action, exclusive of interest and costs, exceeds the sum and value of \$3,000.00.

II.

That Missoula County, one of the plaintiffs herein, is a body politic and corporate, organized and existing under the laws of the State of Montana; that

Missoula Ice Company, one of the plaintiffs herein, is a corporation, organized and existing under the laws of the State of Montana; that Montana Power Company, the defendant herein, is a corporation organized and existing under the laws of the State of New Jersey.

III.

That Rattlesnake Creek, described in this complaint, is a stream of fresh and flowing water arising in the mountains north of Missoula in Missoula County, Montana, and flowing southwardly into Missoula River and is a tributary of said Missoula River and is situated in Missoula County, Montana.

IV.

That upon the 9th day of July, 1930, in the District Court of the Fourth Judicial District of the State of Mon- [275] tana, in and for the County of Missoula, in a cause then pending in said Court, wherein the Missoula Water Company was plaintiff and Charles E. Williams and others were defendants, being Cause No. 1953 of said court, a decree was duly given, made, rendered and entered, adjudicating the waters of said Rattlesnake Creek between appropriators and claimants to the use of the waters of said creek and determining the respective rights, priorities and amounts to the use of such waters among the said appropriators and users thereof, a copy of said decree and judgment is attached to and made a part of the complaint

herein and is hereby referred to. By the judgment and decree aforesaid the rights, priorities, amounts of water and dates of appropriations of the waters of Rattlesnake Creek were fully adjudicated and determined and said Rattlesnake Creek became, and thereafter was, an adjudicated stream, as defined by Section 7128, Revised Codes of Montana, 1921, and that said judgment has not been reversed nor in any way modified nor set aside.

V.

That in said Cause No. 1953 the Court did make findings of fact, Finding of Fact No. 1 being as follows:

“1. That the plaintiff by its predecessors in interest made an appropriation of 946 inches of waters of Rattlesnake Creek, mentioned and described in the complaint herein, about April 1, 1866, by what is called the Mill ditch, for mechanical, power and other beneficial purposes, and that the same has been used by plaintiff and its predecessors in interest ever since, and that no part thereof has ever been abandoned.”

Findings of Fact No. 2 being:

“2. That the plaintiff by its predecessors in interest made an appropriation of 160 inches of the waters of said Rattlesnake [276] Creek November 16, 1868, by what is called the original Higgins ditch, and that no part of said appropriation has ever been abandoned.”

Findings of Fact No. 9 being:

“9. That the plaintiff, by its predecessors in interest, about May 1, 1881, enlarged the original Higgins ditch and extended it to other lands, increasing its capacity and use from 160 inches to 508 inches, thereby making an additional appropriation of the waters of said Rattlesnake Creek of 348 inches, of date May 1, 1881, and that no part thereof has ever been abandoned.”

Defendant claims ownership of the water rights and appropriations of the waters of Rattlesnake Creek found, decreed and described in said Findings of Fact 1, 2 and 9, foregoing described, and defendant at the times alleged in the complaint in this action has assumed possession of said water rights and appropriations of water and has diverted said water from said Rattlesnake Creek and has made use thereof and claims the same.

VI.

That the water right and appropriation of water described in Finding of Fact No. 1, foregoing, was appropriated through what is called the Mill ditch out of said Rattlesnake Creek and at all times from the time of the appropriation thereof down to and subsequent to the date of the judgment in said Cause No. 1953, said water so appropriated and found and decreed in said Cause No. 1953, was diverted out of Rattlesnake Creek through said Mill ditch and was used for mechanical and power purposes along said Mill ditch.

That the water right and appropriation of water described in Finding of Fact No. 2, foregoing, was appropriated through what is called the original Higgins Ditch out of said Rattlesnake Creek and at all times from the time of the appropriation thereof down to and subsequent to the date of the judgment [277] in said Cause No. 1953, said water so appropriated and found and decreed in said Cause No. 1953, was diverted out of Rattlesnake Creek through said original Higgins ditch and was used for irrigation upon agricultural lands along said original Higgins ditch.

That the water right and appropriation of water described in Finding of Fact No. 9, foregoing, was appropriated through what is called the original Higgins ditch enlarged out of said Rattlesnake Creek and at all times from the time of the appropriation thereof down to and subsequent to the date of the judgment in said Cause No. 1953, said water so appropriated and found and decreed in said Cause No. 1953, was diverted out of Rattlesnake Creek through said original Higgins ditch enlarged and was used for irrigation upon agricultural lands along said original Higgins ditch enlarged.

Said Mill ditch taps said Rattlesnake Creek upon its right bank about a quarter of a mile above the mouth of Rattlesnake Creek. Said original Higgins ditch and as enlarged taps said Rattlesnake Creek upon its right bank at a point about two miles above the mouth of Rattlesnake Creek.

VII.

Defendant Montana Power Company is the successor in interest of the Missoula Water Company,

who was the plaintiff in said cause No. 1953, in the ownership of all waters, water rights and appropriations of water decreed to said The Missoula Water Company in Cause No. 1953, and defendant has taken, and now takes, possession of the waters of Rattlesnake Creek as the successor in title and in interest of The Missoula Water Company to the extent of the appropriations found in said Findings of Fact 1, 2 and 9, foregoing described. [278]

VIII.

That subsequent to the date of the decree in said Cause No. 1953, defendant and its grantors and predecessors in interest abandoned said Mill ditch and went upon said Rattlesnake Creek to a point higher up on said creek than the head of said Mill ditch, that is to say, to a point near the North line of Township 13 North, Range 19 West, the point of the present dam, and there diverted from Rattlesnake Creek 946 inches of water, claiming the same as the water right described in said Finding of Fact No. 1. The water right and appropriation of water described in Finding of Fact No. 1 for 946 inches of water was appropriated and was decreed to be taken from the water flowing in said creek at the head of said Mill ditch.

That subsequent to the date of said decree, defendant and its grantors and predecessors in interest abandoned said original Higgins ditch and went upon said Rattlesnake Creek to a point higher up on said creek than the head of said original Higgins ditch, that is to say, to a point near the North line of Township 13 North, Range 19 West, and there diverted from Rattlesnake Creek 160

inches of water, claiming the same as the water right described in said Finding of Fact No. 2. The water right and appropriation of water described in said Finding of Fact No. 2 for 160 inches of water was appropriated and was decreed to be taken from the water flowing in said creek at the head of said original Higgins ditch.

That subsequent to the date of said decree, defendant and its grantors and predecessors in interest abandoned said original Higgins ditch enlarged and went up said Rattlesnake Creek to a point higher up on said creek than the head of [279] said original Higgins ditch enlarged, that is to say, to a point near the North line of Township 13 North, Range 19 West (designated "Dam" on the maps) and there diverted from Rattlesnake Creek 348 inches of water, claiming the same as the water right described in said Finding of Fact No. 9. The water right and appropriation of water described in said Finding of Fact No. 9 for 348 inches of water was appropriated and was decreed to be taken from the water flowing in said creek at the head of said original Higgins ditch enlarged. The new point of diversion whereat defendant and its grantors and predecessors diverted each said 946 inches, said 160 inches and said 348 inches of water, is identical with the place designated upon the maps introduced in evidence as "Dam".

IX.

Each of the plaintiffs severally owns and is possessed of the premises alleged in the complaint to belong to said respective plaintiff. All of said lands are situated along and in the vicinity of Rattlesnake

Creek, but higher up on said creek than the place where with said Mill ditch or said Original Higgins ditch diverted water. The lands of each plaintiff described in the complaint are agricultural in character, but arid and require irrigation for the successful and profitable working thereof and the enjoyment thereof. As an appurtenant to his land described in the complaint, each plaintiff owns and is entitled to the use and possession of the water right out of Rattlesnake Creek claimed by him in the complaint in this action; all of which said water rights were included in the decree in Cause No. 1953 and were adjudicated in that action; plaintiffs own and are entitled to use said water rights severally, but the aggregate of the water rights decreed to plaintiffs in Cause No. 1953 are as follows:

45 inches of Right 5, through Williams Ditch; 145 inches of Right 10, through Hollenbeck Ditch; 50 inches of Right 16, through Hollenbeck Ditch; 100 inches of Right 17, through Effinger Ditch; 50 inches of Right 18, through Neill ditch; 248 inches of Right 20, through Quast Ditch; 129.3 inches of Right 21, through Cobban-Raymond ditch; 55 inches of Right 22, through Hamilton Ditch.

In addition to said rights, plaintiffs Charles A. Martinson and Freda Martinson, co-partners, doing business under the firm name of Missoula Ice Company, own and are entitled to use 150 inches of the water of said creek as of date, August 1st, 1901, which use is limited to ice manufacture purposes

and after the expiration of the irrigation season in each year when water is not required by any agricultural user.

The use of all such waters by plaintiffs is necessary for the respective purposes of each plaintiff and is a beneficial use.

The names of the several ditches referred to in this findings are the names by which said ditches are commonly designated in the neighborhood and the same are shown upon the maps introduced in evidence and are designated respectively by such names. The same divert water from Rattlesnake Creek at points in the vicinity of said "Dam". Said Effinger ditch, Williams ditch and Quast ditch divert water at different points on the stream all near to and short distances above said "Dam". Said Cobban-Raymond ditch, Neill ditch, Hollenbeck ditch and Hamilton ditch divert water at different points on the stream all near to and short distances below said "Dam". The heads of all said ditches, [281] through which plaintiffs divert water, are located on said stream a long distance above the place where original Higgins ditch diverted water from the stream and above the place where the Mill ditch diverted water from the stream.

X.

In normal years at the low water time of the year, namely, the first two weeks of the month of August of each year, there is about 1,600 miner's inches of water flowing in the creek. For many years previous to the commencement of this action at the place on said stream designated on the maps as

“Dam”, by means of a pipe, defendant has diverted water to supply the City of Missoula and its inhabitants. At such times it has been defendant’s practice to so divert the water of said creek that the whole of such flow at the “Dam” is carried into its pipe line, leaving the bed of the creek below its diversion dam, dry or without a substantial flow. Water raises in the bed and channel of the creek below the “Dam” and above the head of original Higgins Ditch and above the head of the Mill ditch to the extent that during such period of low water, there is again naturally flowing in said stream an amount varying from 400 to 800 miner’s inches at the head of the Mill ditch and which could be diverted into the Mill ditch if so desired. Some of this water so raising in the bed of the creek below the “Dam”, raises and is flowing in the creek at the head of the original Higgins Ditch. During the years complained of in the complaint, namely, during 1931, 1932 and 1933, such water so raising in the creek below the “Dam” for the most part has flowed to waste out of the mouth of the creek and was not available to supply the appropriations of any of the plaintiffs. Unless restrain- [282] ed by the court such conditions will continue in the future. During times when water has flowed to waste out of the Rattlesnake Creek, plaintiffs have needed the water for which they had decreed rights and to the extent of such decreed rights, but were unable to obtain water to supply such rights.

XI.

Defendant, claiming to be the owner, claims the perpetual right to change the point of diversion of

said waters so described in Findings of Fact Numbered 1, 2 and 9, of Cause No. 1953, and so decreed to The Missoula Water Company, to a point near the North line of Township 13 North, Range 19 West, and thereby intends to, and unless enjoined by this Court will, perpetually so divert the entire flow of Rattlesnake Creek to the irreparable damage and injury of plaintiffs, and each and all of the plaintiffs.

XII.

If defendant had not attempted during the years 1931, 1932, and 1933 to change the point of diversion of the appropriation of water described in Findings of Fact Nos. 1, 2 and 9 of Cause No. 1953, and so decreed to the Missoula Water Company, to the point higher up on said stream and which is designated "Dam" on said maps, the amount of water flowing in Rattlesnake Creek at said higher up point so marked "Dam" on the maps, would have been sufficient to supply the rights to which plaintiffs were entitled and which had been decreed to their predecessors in Cause No. 1953, and also sufficient to satisfy the rights of defendant for appropriation made by defendant's predecessors at said higher up point, and at the same time there was sufficient water flowing in the stream at the head of the original Higgins ditch and at the head of [283] the Mill ditch to satisfy the appropriation described in Finding of Fact 1, 2, and 9 of Cause No. 1953; but because defendant claimed the right to change the point of diversion of the appropriation described in said Finding of Fact Nos. 1, 2 and

9 of Cause No. 1953, and attempted to divert the water to satisfy said appropriations at the place on said creek designated as "Dam" on the maps, defendant exhausted the flow of the stream at that point and at the head of plaintiff's several ditches and prevented plaintiffs from getting the water to satisfy their appropriations and at the same time caused water, at times more than 600 miner's inches flowing in the stream at the head of the Mill ditch, to run to waste. The attempted and pretended change of point of diversion, by defendant and its predecessors, did cause and is causing injury to plaintiffs.

XIII.

By the attempted change of point of diversion aforesaid, defendant is depriving plaintiffs, and all of plaintiffs, of the waters which they own and which they, and each of them, need for the irrigation of their own agricultural crops, by reason whereof plaintiffs' agricultural crops are being injured and destroyed and defendant intends and threatens to continue said attempted change of point of diversion of said water perpetually and will so continue to divert said waters to the irreparable loss of all of the plaintiffs unless enjoined by this Court. The claim of defendant to the right to change said point of diversion of water rights, which it claims, is without authority of law and is invalid.

XIV.

The appropriations of the waters of Rattlesnake Creek [284] of the plaintiffs and of each of the

plaintiffs, herein described, were accomplished and completed and many years prior in date to the pretended and attempted change of point of diversion of defendant and its predecessors in interest, from respectively the heads of the Mill ditch, original Higgins ditch and original Higgins ditch enlarged to a point near the North line of Township Thirteen North, Range 19 West; if defendant or its predecessors in interest ever acquired any right to divert any of the waters of Rattlesnake Creek at or near the last named point, such right of defendant is subsequent and junior to the rights of the plaintiffs, and each and all such rights, and is subject thereto, and defendant does not have the right to divert the waters of Rattlesnake Creek at or near the last named point at any time when the plaintiffs or any of the plaintiffs have need for the waters of said creek.

XV.

That the acts and conduct of defendant herein found and claim of defendant herein found constitute and are a cloud upon plaintiffs' right and title to their several properties; and notwithstanding that defendant's said claims and acts are without authority of law, the same interfere with the right to his property of each plaintiff and with his enjoyment thereof and plaintiffs do not have, nor has any of the plaintiffs, any plain, speedy or adequate remedy at law.

XVI.

The court finds that plaintiffs' action is not barred by the provisions of Section 9041 Revised Codes of

Montana, 1921, nor is the same barred by any provision of the Statutes of Montana; neither are plaintiffs barred nor estopped from maintaining this action because of the delay or lapse of time, [285] if any such, in the bringing thereof, and the court does expressly find against the defendant upon the plea that the plaintiffs' cause of action is barred by limitation, and likewise the court finds against the defendant upon defendant's plea that plaintiffs' cause of action is barred by reason of the laches of plaintiffs or any of the plaintiffs or their predecessors in interest or any thereof.

XVII.

That the plaintiffs were not guilty of laches, either in the commencement of their suit, or in the prosecution thereof, and that the plaintiffs' right of action set forth in the pleadings herein against the defendant is not barred by laches.

XVIII.

That the plaintiffs' action was instituted in good time and is not barred by the statute of limitations.

XIX.

Plaintiffs shall recover from defendant, costs and disbursements in this action.

From the foregoing facts the Court finds as Conclusions of Law as follows:

CONCLUSIONS OF LAW

I.

That defendant herein has the legal right to divert from Rattlesnake Creek at the place designated on the maps introduced in evidence in this cause as "Dam" to the extent that it has need therefor, the water awarded and adjudicated to its predecessors in the decree in Cause No. 1953 by rights Nos. 3, 8 and 14 of the Findings of Fact in said decree and within the limits and according to the priorities prescribed [286] in said decree, for the purpose of supplying the city of Missoula and its inhabitants with water, but defendant does not have the right to divert at said place designated on said maps as "Dam" water to satisfy any of the other decreed rights included or adjudicated by the decree in Cause No. 1953 to its predecessor in interest or to any persons and which rights have since been acquired by defendant or its predecessors, whenever plaintiffs have need for such water.

II.

That the attempt by defendant and its predecessors in interest to change the place of diversion of Right No. 1 in the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam", and likewise the attempt of defendant and its predecessors in interest, to change the place of diversion of Right No. 2, in the Findings of Fact of the decree in Cause No. 1953, from the head of original Higgins ditch to the "Dam"; and

likewise the attempt of defendant and its predecessors in interest to change the place of appropriation of Right No. 9 in the Findings of Fact of the decree in Cause No. 1953 from the head of original Higgins ditch to the "Dam" are, and each of said attempts is injurious to plaintiffs, and said attempts cause, and each said attempts caused damage and prejudice to plaintiffs and all of plaintiffs.

III.

That plaintiffs are entitled to an injunction restraining defendant from making the changes in place of diversion of the water rights described in the complaint in this action and referred to in these findings, or making either or any of such changes, whenever plaintiffs or any of [287] plaintiffs shall be unable to obtain water at his or their point of diversion on account of defendant's diversion, said plaintiff or plaintiffs then having need for such water. Particularly plaintiffs shall be entitled to enjoin and restrain defendant from changing the point of diversion of right No. 1 of the Findings of Fact in the decree in Cause No. 1953 from the head of the Mill ditch to the "Dam", and shall be entitled to enjoin and restrain defendant from changing the point of diversion of right No. 2 of the Findings of Fact of the decree in Cause No. 1953 from the head of the original Higgins ditch to the "Dam", and shall be entitled to enjoin and restrain defendant from changing the point of diversion of Right No. 9 of the Findings of Fact of the decree in Cause No. 1953 from the head of original Hig-

gins ditch to the "Dam" at any time whenever plaintiffs or any of plaintiffs have need for the water to satisfy their own appropriations and are unable to obtain the water to satisfy their own appropriations because of defendant's diversion thereof.

IV.

The claim of defendant to have the right to change the point of diversion of the water awarded and decreed to its predecessors in interest in Findings 1, 2 and 9, from the head of the Mill ditch and original Higgins ditch to the "Dam", is wrongful and without authority of law and is invalid, being injurious to plaintiffs, and defendant shall not have the right to make change of the point of diversion of said water rights, nor any thereof, whenever plaintiffs or any of plaintiffs have need for such water and are deprived of the water on account of any diversion of water by defendant. [288]

V.

That the plaintiffs were not guilty of laches, either in the commencement of their suit, or in the prosecution thereof, and that the plaintiffs' right of action set forth in the pleadings herein against the defendant is not barred by laches.

VI.

That the plaintiffs' action was instituted in good time and is not barred by the statute of limitations.

VII.

The court decides the issues herein in favor of plaintiffs and against defendant.

Let decree and judgment be entered accordingly.

Dated....., 1933.

.....
Judge. [289]

DEFENDANT'S REQUEST FOR FINDINGS
IS AS FOLLOWS:

FINDINGS OF FACT

I.

The defendant herein is the successor in interest by mesne conveyances of The Missoula Water Company, the plaintiff in Cause No. 1953 heretofore tried in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, and its predecessors, and has succeeded to all of the property of said company and its predecessors, including the water rights decreed to it in said cause.

II.

That the defendant is, and its predecessors in interest were at all times referred to in the pleadings herein, public utilities owning and operating the water system and works used to divert water from Rattlesnake Creek, the stream involved in this action, and distribute said water to the City of Missoula, Montana, and its inhabitants for fire protec-

tion and general household, domestic, irrigation, and other useful purposes, said defendant and its predecessors being authorized to engage in the sale and distribution of water, and being the owners of a franchise granted by the city of Missoula, a municipal corporation of the State of Montana, giving a perpetual right to the use of the streets and alleys of said city for pipes used to serve the said city and its people.

III.

That on the 26th day of July, 1904, final decree was duly made, given and entered in said Cause No. 1953, copy [290] of which decree is attached to the plaintiff's complaint herein, and which decree has not since been modified or set aside. That by said decree the following rights to the use of water from said Rattlesnake Creek were decreed to the defendant's predecessor:

Right No. 1, for 946" as of date 1866

“ “ 2, “ 160" as of date 1868

“ “ 3, “ 131½" as of date 1871

Part of Right No. 4,

amounting to 65" as of date 1871

Right No. 8, for 46½" as of date 1881

“ “ 9, 348" as of date 1881, and

“ “ 14, “ 645" as of date 1887.

That the following rights which were decreed in said cause to others have been acquired by the defendant's predecessors since said decree:

Part of Right No. 5,
amounting to 115" as of date 1872
Right No. 11, for 130" as of date 1882
Right No. 19, for 50" as of date 1892
Part of Right No. 20,
amounting to 65" as of date 1895, and
Part of Right No. 21,
amounting to 142" as of date 1895.

That each and all of the rights mentioned in this paragraph are and were at the time of the commencement of this action owned by the defendant.

IV.

That prior to the institution of said action No. 1953, the defendant's predecessors were the owners of said rights thereafter designated in the decree in said cause as rights numbered 1, 2 and 9, and that prior to the institution of said action defendant's predecessors diverted from said stream through what was known as the old city flume, at a point approximately one mile down stream from the present point of diversion, water sufficient to furnish a water supply to [291] the City of Missoula and its inhabitants, claiming the right to divert the water to which they were entitled from said stream for said purpose, and that this diversion and use from said point continued until the construction of the diversion works and the actual diversion referred to in the next succeeding Finding of Fact, the same being No. V.

V.

That in said cause No. 1953 The Missoula Water Company, defendant's predecessor in interest, was plaintiff and claimed certain rights to the use of water from said stream for the purpose of supplying the City of Missoula and its inhabitants, and that in the year 1902 and prior to the decree in said cause, the said predecessor in interest constructed at the point where the present diversion dam is now located upon said stream permanent diversion works, including a dam and pipe line leading to a concrete reservoir, which was connected with the distribution system supplying the city of Missoula, and during said year diverted the water necessary for furnishing said city and its inhabitants, and since said time the water required for such purpose has been continuously diverted by defendant and its predecessors at said point and the needs of the City of Missoula and its inhabitants supplied therefrom, and no water has been diverted from any other point on said stream for said purpose. That at said time in 1902 the old diversion through the said flume was discontinued.

VI.

That at the time of the construction of the diversion works mentioned in the preceding Finding and the diversion of water at said point, there was no intention upon the part of the defendant's predecessor to abandon any of the water rights [292] in said stream owned or claimed by it.

VII.

That at the time of the trial of Cause No. 1953, it was known by all of the parties thereto that diversion at the present point of the water to which defendant's predecessor was entitled from said stream to the extent necessary to supply the city of Missoula and its inhabitants, was contemplated and intended.

VIII.

That all of the plaintiffs in this action, with the exception of Missoula County, acquired such rights as they have to the use of the waters of said stream long subsequent to the time when the permanent point of diversion was established at its present location, and long subsequent to the entry of the decree in said Cause No. 1953, and that the plaintiffs herein and their predecessors in interest since the year 1902 knew that the water necessary for furnishing the city of Missoula and its inhabitants was being diverted at the present point of diversion and that they and all of them have acquiesced therein, and the defendant's water rights to the extent required have since been distributed at said point.

IX.

That by diverting the water required by defendant and its predecessors at the present point of diversion instead of at the point or points at which the same was previously diverted, no detriment or injury was or has been caused to the plaintiffs or their predecessors, and no diminution has resulted

in the amount of water available to other users on the stream. [293]

X.

That for more than thirty years immediately prior to the beginning of this action the defendant and its predecessors have diverted from Rattlesnake Creek at the point where its present diversion dam is located, the water necessary for supplying the city of Missoula and its inhabitants. That said diversion and use have been open, notorious, exclusive, continuous, and under claim of right as against plaintiffs and their predecessors and all other persons.

XI.

That the diversion at the present location of the defendant's diversion dam was made by substantial and permanent diversion works and reservoirs, and was done openly and notoriously and to the knowledge of the plaintiffs and their predecessors in interest, and that prior to the commencement of this action no action was ever brought by the plaintiffs or by any of their predecessors in interest seeking to enjoin, question or oppose the acts complained of in the present complaint. That the plaintiffs and their predecessors in interest stood by while such diversion was made and while the defendant and its predecessors in interest have expended large sums for such diversion works and for the construction and improvement thereof and the repair and improvement of the distribution system, and that during said period of time the entire system has been several times sold and transferred to new

purchasers. That during said period of time many witnesses who were familiar with the operation of said water works system and the facts and conditions existing in the year 1902, and prior thereto, and at the time such diversion was made, have died or become unavailable as witnesses, and [294] that plaintiffs and their predecessors with full knowledge have acquiesced in the diversion of water at said point and the use thereof for said purpose for more than thirty years continuously.

XII.

That neither the defendant nor its predecessors in interest have deprived the plaintiffs or their predecessors of the use of any water from Rattlesnake Creek to which they, or any of them, was or were lawfully entitled.

From the foregoing Findings of Fact, the defendant proposes the following—

CONCLUSIONS OF LAW

I.

That the defendant herein has the legal right to divert at its diversion dam in Rattlesnake Creek, being the present point of diversion, from the rights decreed to its predecessor in the decree in Cause No. 1953, and within the limits and according to the priorities prescribed in said decree, the amount of water necessary for supplying the City of Missoula and its inhabitants. That it is the owner of said rights, and none of the same has ever been abandoned.

II.

That the plaintiffs herein, and each and all of them, are barred by laches from questioning or disputing the right of the defendant so to do.

III.

That the plaintiffs herein under the facts proven and found by the court, are not entitled to any relief in equity.

DECREE ACCORDINGLY.

.....
Judge. [295]

The foregoing constitutes all the testimony introduced upon the trial of said cause and all the proceedings had upon the trial.

And now within the time allowed by law, the plaintiff and appellant lodges of the foregoing proposed statement of evidence and asks that the same be signed, settled and approved.

E. C. MULRONEY

S. P. WILSON

Attorneys for Plaintiff and
Appellant.

Lodged this.....day of April, 1934, with
the Clerk of the Above Court.

.....
Clerk of the United States District Court.

By.....

Deputy.

Service of foregoing proposed Statement of Evidence accepted by copy this 18th day of April, 1934.

MURPHY & WHITLOCK,

Of Counsel for Defendant

It is hereby stipulated and agreed between the parties to the above action be their respective attorneys that the foregoing may be signed, settled and approved as and for the statement of evidence herein.

Dated this.....day of April, 1934.

.....
Attorneys for Plaintiffs and Appellants.

.....
Attorneys for Defendant and Respondent.

CERTIFICATE OF JUDGE

I, George M. Bourquin, Judge of the above entitled Court, and the Judge before whom said cause was tried, hereby certify that the foregoing is a true and correct narrative statement of the evidence in the above entitled suit No. 1488, and that the same is now by me duly settled, allowed and approved as the statement of evidence in said cause.

BOURQUIN,
Judge.

[Endorsed]: Filed May 3, 1934. [296]

Thereafter, on May 3rd, 1934, Praeceptum for Transcript of Record was duly filed herein, in the words and figures following, to wit: [297]

[Title of Court and Cause.]

PRAECEPTUM.

[298]

To the Clerk of the above-entitled Court.

You will please prepare a transcript of the Record to be filed in United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause and incorporate in such Transcript of Record the following papers or exhibits:

1. Complaint
2. Defendant's motion to dismiss
3. Minutes of the Court showing decision of motion to dismiss
4. Answer
5. Decision and opinion of Court after trial of the issues
6. Petition for allowance of appeal
7. Order allowing appeal
8. Prayer for reversal
9. Assignment of errors
10. Citation on appeal
11. Bond on appeal
12. Statement of evidence settled and approved herein.
13. This praecipe with acknowledgement of service thereon.

Said Transcript to be prepared and duly certified by you as required by law and the rules of the

above-entitled court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this day of April, 1934.

E. C. MULRONEY and
S. P. WILSON

Attorneys for Plaintiffs.

Service of the foregoing praecipe is hereby admitted and a copy of the same received at Missoula, Montana, this 3rd day of May, 1934.

W. L. MURPHY

A. N. WHITLOCK

Attorneys for Defendant.

[Endorsed]: Filed May 3, 1934. [299]

Thereafter, on May 9th, 1934, a Counter-Praecipe for Additional Portions of the Record was filed herein, in the words and figures following, to wit:
[300]

[Title of Court and Cause.]

COUNTER-PRAECIPE

To the Clerk of the above entitled Court:

In connection with the appeal in the above entitled cause the defendant and appellee in addition to the papers and exhibits requested by the appellants to be incorporated in the transcript on appeal to be prepared by you, hereby requests that you include in such transcript the following:

1. The original decree filed in said cause.

2. The defendant's motion to adopt proposed Findings and Conclusions, together with the proposed Findings and Conclusions filed and submitted at the close of the testimony in said cause.
3. You are further requested to transmit to the Appellate Court defendant's original exhibits numbered 6 and 7.

Dated: May 8th, 1934.

MURPHY & WHITLOCK,
Attorneys for Defendant.

Service of the foregoing Counter-praeceipe is hereby admitted and receipt of copy acknowledged this 8th day of May, 1934.

S. P. WILSON
E. C. MULRONEY.

[Endorsed]: Filed May 9, 1934. [302]

Thereafter, on May 9th, 1934, an Order to Transmit Certain Original Exhibits was entered herein, in the words and figures following, to wit: [303]

[Title of Court and Cause.]

ORDER

It appearing that it is necessary and proper that defendant's Exhibit No. 6, being a map introduced in evidence at the trial of the above entitled action and referred to at page 55 of the statement of the case, and defendant's Exhibit No. 7, being a chart

admitted in evidence at said trial and referred to on page 58 of said statement of the evidence, should be transmitted to the Circuit Court of Appeals of the Ninth Circuit along with the original record on appeal in the above entitled cause;

It is therefore ordered, that said original exhibits, defendant's Exhibit No. 6, and defendant's Exhibit No. 7, be transmitted by the clerk of this court to the said Appellate Court for its inspection in connection with said appeal.

Not to waive printing, unless the court waives.

Dated: May 9th, 1934.

BOURQUIN,

Judge.

[Endorsed]: Filed May 9, 1934. [305]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 305 pages, numbered consecutively from 1 to 305 inclusive, constitute a full, true and correct transcript of the record and proceedings in case No. 1488, Sain, et al. vs. Montana Power Company, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

And I further certify that the costs of said transcript of record amount to the sum of Fifty-one & 75/100 Dollars, (\$51.75), and have been paid by the appellants.

Witness my hand and the seal of said court at Helena, Montana, this May 25th, A. D. 1934.

[Seal]

C. R. GARLOW,

Clerk as aforesaid. [306]

[Endorsed]: No. 7499. United States Circuit Court of Appeals for the Ninth Circuit. Jackson C. Sain, Hettie Sain, Ed. Ray, Joseph H. McDonald, Missoula County, Tennie E. Greenough, Clara Pidge, W. T. Burnett, George Cromwell, Glenn Sticht, G. W. Leaphart, Josephine Youngquist, Harry E. Stetson, et al., Appellants, vs. The Montana Power Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 28, 1934.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

